Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1993

JOHN DOE, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JAMES AND MARY DOE,

Petitioners,

v.

THE BOARD OF EDUCATION OF TULLAHOMA CITY SCHOOLS; CHARLES EMBRY, Superintendent,

Respondents.

Petition For A Writ Of Certiorari
Rule 33.2.(6)

BRIEF FOR PETITIONERS

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58 pp

QUESTIONS PRESENTED

1. Where the federal IDEA requires each state to meet its own special education standards, and where Tenn. Code Ann. section 49 10-101(a)(1) explicitly requires each school district to provide special education to maximize the capabilities of handicapped children, did the Sixth Circuit err in refusing to accept that mandate as Tennessee's federal standard, even though this was a direct departure from holdings by the First and Third Circuit in analogous cases?

2. Did the Sixth Circuit Court of Appeals substantially depart from the accepted and usual course of judicial proceedings, by ignoring a requirement of a Tennessee statute in a manner the Tennessee Supreme Court within its supervisory jurisdiction has forbidden. If so, did this constitute such a departure as to call for an exercise of the Supreme Court's power of supervision?

3. Where the General Assembly explicitly enacts "a carefully tailored" scheme to "require school districts to . . .provide services sufficient to maximize the capabilities of handicapped children," (Tenn. Code Ann. section 49-10-101(a)(1)) and where Congress subsequently sought both to establish a federal standard and to preserve higher state standards as the alternative federal standard, did the Court of Appeals err by using its own notions of desirable policy to eliminate Tennessee's maximization of services requirement?

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Cases

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Equitable Life Assurance Co. of U.S. v. Odle,
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CHARLES EMBRY, Superintendent,

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit below (Appendix A, infra, p. 1a) is reported at 9 F.3d 455 (6th Cir. 1993). The order and decision of the United States District Court for the Eastern District of Tennessee (Appendix C, infra, p. 26a) is unreported. The order and decision of the Tennessee Department of Education (Appendix E, infra, p. 49a) is reported in 17 EHLR 213.

Jurisdiction

The judgment of the Court of Appeals below (Appendix A, infra, p. 1a) was entered on November 5, 1993. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1). 28 U.S.C. section 2403(a) and section 2403(b) may be applicable and copies have been served persuant to Supreme Court Rule 29. There is no certification persuant to 28 U.S.C. section 2403.

Statutory and Regulatory Provisions Involved

Relevant sections of the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 et.seq. (West 1990 & Supp. 1993), and Tenn. Code Ann. section 49-10-101(a)(1) (1990), are set forth in the Appendix to the Petition for Writ of Certiorari. (Appendix F & G, infra, pp. 72a-152a.)

Statement of the Case

1. The Statutory Scheme: This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. section 1400-1485. ("IDEA"or "Act"), formerly titled the Education of the Handicapped Act. Appendix F at p. 72a. IDEA imposes a number of conditions on states in return for federal funds to aid in educating children with disabilities. The essential condition is that states provide a "free appropriate public education" ("FAPE"). 20 U.S.C. section 1412(6). Appendix F at p. 72a. Pursuant to the Act, a FAPE consists of schooling that is

provided at public expense, under public supervision and direction, in conformity with an "individualized education program" ("IEP")[1], and, significantly, one that *meets the standards of the state educational agency. See* 20 U.S.C. section 1401(a)(18). Appendix F at p. 72a. By this catchall provision, federal law incorporates any state standards that go beyond the minimum standards of the Act, and thereby confers on the federal courts authority to enforce such standards under their "federal question" jurisdiction. 28 U.S.C. section 1331; *Geis v. Board of Educ. of Parsippany-Troy Hills*, 774 F.2d 575, 575 (3d Cir. 1985).

In Tennessee, public schools serving handicapped students also must conform to certain

[1] The centerpoint of the Act's procedural requirements is the IEP, which "results in individualized consideration of and instruction for each child." *Board of Educ. v. Rowley*, 458 U.S. 176, 189 (1982). This customized educational program must be prepared at a meeting between a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child (M-Team). Appendix F at p. 72a. 20 U.S.C. §1401 (a)(20).

standards set forth by the Tennessee General Assembly and the Tennessee Department of Education regulations[2]. These standards include those enunciated by the Tennessee General Assembly in Tenn. Code Annot. section 49-10-101(a)(1) (1990) (Appendix G at p. 152a), which provides:

> Legislative intent -- Application of parts 1-6 (a)(1). It is the policy of this state to provide, and to require school districts to provide, as an integral part of free public education, special education services sufficient to meet the needs and *maximize the capabilities of handicapped* children.(emphasis added)

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[2] In Addition, states seeking to receive federal funding under the Act must submit a State Plan to the Secretary of Education. 20 U.S.C. 1413. Appendix F at p. 72a. The Plan must include several assurances concerning *inter alia*, proper expenditure of federal funds, personnel development and certification, and steps to be taken to assure a FAPE to all children with disabilities. 20 U.S.C. 1412(2), 1413. Prior to release of federal funds, the Secretary of Education must approve a state's Plan. *Id.* at §1413(c). Tennessee operates under an approved Plan.

In contrast, IDEA, passed in 1975, sets a more minimal standard than Tennessee's special education statute. IDEA requires that a school district only provide handicapped children with a "free appropriate education." See 20 U.S.C. section 1401 *et seq.*

2. *The Facts regarding the child.* Prior to the fall of 1990, John was a sixteen year old, learning disabled student in the Respondents' School System. Adm. Tr., I, 98-100; Tr.46[3]. Throughout his years there, John experienced academic difficulty culminating in a suicide gesture in the fall of 1989. Adm.Tr., II, 289-90. Despite a series of subsequent meetings between John's parents and

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[3] References to the transscript of the proceedings in the United States District Court on April 29, 1992 will be denoted by Tr., followed by page number. References to the record of the due process hearing before the state of Tennessee will be denoted by Adm.Tr. (Administrative Transcript) or Adm.R. (Administrative Record), as appropriate by volume and page number. References to the technical record will be denoted by an R. A list of pertinant items of the technical record is found at Appendix N, p. 309a.

school officials concerning John's problems, school officials took no action to address these problems. Adm. Tr., I, 116-117, 121-122; II, 320-324.

In the summer of 1990, John's parents became concerned Respondents would not implement a timely or appropriate IEP. Adm. Tr.,II, 326. Therefore, John's parents reserved a place for John in Brehm School. Adm. Tr.,II, 326. Brehm School is a special school for learning disabled children in Carbondale, Illinois. Adm. Tr., II, 326. However, notwithstanding their reservations, John's parents continued the IEP process. Adm. R., Exhibit 21, 2-3. After an August 7, 1990, M-Team meeting produced no IEP for John, John's parents sought

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[4] On August 21, appellants filed in the United states District Court for the Eastern district of Tennessee a complaint and a motion for preliminary injunction. The complaint alleged, *inter alia*, that appellants had failed to make a proper assessment of John, that had failed to develop an IEP for John, and that, as a result, the parents had been forced to enroll John in the rehm Preliminary Injunction sought "a preliminary injunction requiring defendants to fund John's placement at the Breham School until a due process hearing officer can render an opinion on the appropriateness of this program. . ."

help from federal court[4] to compel Respondent to provide a program for John. Adm. R., Exhibit 21, 17- 44, 47-48; R. 1.

A federal court order entered on September 6, 1990, required Respondents to devise an IEP. R. 15. At this court-ordered September 5, 1990 meeting, Respondents created an IEP recommending that John stay in the Respondents school system. Adm. R., Exhibit 32. However, John's parents and all of John's experts and treating professionals found the IEP inappropriate. Adm. R., Exhibit 36, p. 88-89; Adm. Tr.,I, 14-34, 56, 114- 115, 123-124, 153-63, 174-192, Adm. Tr., Vol II, 201-03, 258-62.

3. *Judicial Proceedings*: Petitioners brought this action pursuant to IDEA. 20 U.S.C. section 1415. The Petitioners alleged at the administrative, district, and appellate court levels that IDEA, by incorporation of state standards, requires the Respondents to provide John[5] a free,

appropriate education which *maximizes* his capabilities as provided by Tenn. Code Ann. section 49-10-101(a)(1). Throughout the proceedings below, Petitioners maintained that an (IEP) prepared by Respondents for John did not satisfy the maximization standards of the Tennessee statute. Petitioners therefore sought reimbursement for expenditures they made in placing John in a special school which clearly would maximize his learning capabilities.

At a due process hearing conducted during September and early October, 1990, the administrative law judge for the Tennessee Department of Education ruled section 49-10-101(a)(1), merely a preamble and without force and effect. Appendix E at p. 49a. Therefore, Petitioners appealed the administrative decision to the United States District Court for the Eastern District of

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[5] The parties agree at all pertinent times John was a minor and a handicapped person within the meaning of IDEA.

Tennessee pursuant to 20 U.S.C. section 1415 and 42 U.S.C. section 1988. In a Memorandum Opinion and Order entered on May 29, 1992, the district court affirmed the decision of the administrative law judge. R. 42-43. Appendix C at p. 26a. The court concluded that section 49-10-101 did not require the school system to develop an IEP which maximized John's capabilities. Therefore, the court held that John's parents were not entitled to reimbursement for the sums they expended in sending John to the Brehm School.

On appeal, the Court of Appeals for the Sixth Circuit affirmed the district court's finding that the school district had done all it was required to do under the law. Appendix A at p. 1a. Turning to the question of maximization, the Sixth Circuit found section 49-10-101(a)(1) void for lack of legislative intent because it predated the Federal Act by three years. It is the propriety of this ruling which Petitioners place before this Court.

ARGUMENT

1. *By Declaring Tenn. Code. Annot. 49-10-101(1)(a) Void Because It Predates the IDEA, The Sixth Circuit Rendered a Decision in Conflict With Its Own Precedent and the Decisions of the First and Third Circuits.*

a. *The Sixth Circuit, in the present case, initially agreed with the First and Third Circuit rulings on the issue of state standards, but nonetheless, ruled to the contrary.* The Sixth Circuit stated in the present case: "[i]n this, and other circuits, it is settled that 'even if a school district complies with federal law, it may still violate the [federal] Act if it fails to satisfy more extensive state protections that may also be in place.' 9 F.3d at 457, *citing Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 620 (6th Cir. 1990); *accord David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 417 (1st Cir. 1985) (It is "beyond cavil

that the federal [IDEA] standard explicitly incorporates some of a state's substantive law") *cert. denied* 475 U.S. 1140 (1986); *Geis v. Board of Educ. of Parsippany-Troy Hills*, 774 F.2d 575, 581 (3d Cir. 1985) ("[W]e find that the incorporation of state standards is explicit in the Act."); 20 U.S.C. section 1401(18)(B). As the Ninth Circuit illustrated: "[e]ven though IDEA does not specifically provide for textbooks, writing materials or appropriately trained teachers, it incorporates the state standards that provides those items." *See Students of Cal. School for the Blind v. Honig*, 736

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[6] Section 1701 of the Massachusetts General Laws ststes *inter alia*:

> The state board shall:
>
> (a)Develop, establish, and continually evaluate and modify in cooperation with intermediate state boards, a state plan for special education which shall provide for the delivery of special education programs and services designed to *develop the maximum potential of every handicapped person.* Appendix H at p. 166a.

F.2d 538 (9th Cir. 1984).

b. *Taking a non-intrusive view of state standards, the First and Third Circuit, unlike the Sixth Circuit, declared antecedence irrelevant to the question of validity of higher state standards under IDEA.* The Massachusetts[6], New Jersey[7], and Michigan[8] statutes, which are the objects of the above cases, contain essentially the same language as the Tennessee statute. Moreover, like Tennessee, their legislatures passed statutes incorporating "maximization" standards prior to

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[7] N.J. Stat. Ann. §18A:46-19.1 (repealed in 1984) stated *inter alia*:

> The legislature hereby finds and determines that the security and welfare of the State require that all school-aged children be assured the *fullest possible opportunity* to develops their intellectual capacities.

[8] Michigan's Mandatoruy Special Education Act provides that the State Board of Education, the intermediate school boards, and local school districts "shall provide special education programs and services *designed to develop the maximum potential of each handicapped person.* M.C.L.A. §§ 380.1711 (emphasis added). Appendix I at p. 178a

the federal act. Although a careful reading of these cases reveals the timing of these statutes, the Sixth Circuit in acknowledging them in the present case, appears unaware timing is not a distinguishable factor between these statutes and Tennessee's statute.

In *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, (1st Cir. 1985) and *Town of Burlington, et al., v. Dept. of Education*, 736 F.2d 773 (1st Cir. 1984), unlike the Sixth Circuit in the present case, the First Circuit contrived no distinction between the force of state standards passed before the federal Act or after. To the contrary, in *Burlington* at 789, note 17, it specifically noted Massachusetts' forefront status in this area: "Massachusetts has a highly developed special education law which predated the federal Act and has served as a model for other state statutes." With these words, the First Circuit took a non-intrusive view of the Act: "We do not believe the Act envisions federal courts

releasing school systems from their state mandated responsibilities and allowing them to comply only with the federal minimums as the Town argues." *Burlington*, 736 F.2d at 792, note 24.

The First Circuit observed the same caution in tinkering with Congress' comprehensive scheme as did this Court in *Smith v. Robinson*, 468 U.S. 992 (1984)("The EHA [now IDEA] is a comprehensive scheme to aid the States in complying with their constitutional obligations [and] . . . allowing a plaintiff to circumvent the EHA's administrative remedies would be inconsistent with that scheme.") The federal judiciary should accord the same cautious respect to the pronouncements of the Tennessee General Assembly as this Court afforded the pronouncements of Congress.

The Third Circuit does not depart from this Court's and the First Circuit's non-intrusive view of the interplay between IDEA and antecedent state statutes. It found that the federal district court has

jurisdiction to enforce a state-mandated standard of educational opportunity against a state agency because the state standard is explicitly incorporated by federal law. Thus, in *Geis, supra* the Court found a *1970* provision of the New Jersey Administrative Code (codified by the new Jersey legislature in *1975*) requires states to provide handicapped pupils a special education program and related services "according to how the pupil can *best achieve* success in learning . . . ." N.J.Admin. Code tit. 6, section 6:28-2.1 (emphasis added) 774 F.2d at 582, note 3. Public School Education Act of 1975, L. 1975, c. 212, as cited in *Levine v. Institution & Agencies Dept. of N.J.*, 418 A.2d 229 (1980).

Similar to *Geis*, in *Barwacz v. Michigan Dept. of Educ.*, 674 F.Supp. 1296 (W.D. Mich. 1987), a case distinguished by the Sixth Circuit in *Doe*, 9 F.3d at 458, note 2, the district court found an antecedent state standard to be the federal standard.

Inaccurately, the Sixth Circuit inaccurately distinguished the facts in *Barwacz* from the present case. *Doe*, 9 F.3d at 458. Specifically, *Barwacz* addressed the relationship between the timing of higher state standards and validity of those standards in depth. The *Barwacz* court not only found Michigan's 1972 special education statute created a higher standard than the federal minimum, it specifically ruled that statutes requiring a higher standard are not voided by subsequent passage of the federal Act. Most importantly, the *Barwacz* court rejected the Defendant's (and the Sixth Circuit's) contention: If the Michigan legislature did not use the federal requirements as a guide, it could not be said that

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[9] The *Barwacz* Court stated:

The court is not persuaded that this is so. Although the Michigan Supreme Court has not addressed this issue, there is some indication based on the relatively few Michigan Court of Appeals decisions which have interprted the Act itself, as well *as the plain language of the Act itself* that Michigan requires something more than the basic federal minimum. 674F.Supp. 1296 at 1304.

Michigan intended to impose a more strict standard.[9] Thus, the *Barwacz* court similarly demonstrates the philosophy of judicial restraint which is the hallmark of the First and Third Circuit's decisions, *supra*, that the Sixth Circuit asserts it embraces.

2. *Although the Foregoing First and Third Circuit Decisions Represent a Philosophy of Federal Restraint From Interference in the Primacy of the State's Role in Education, the Sixth Circuit Rejected This Philosophy.*

a. *The Sixth Circuit's declaration that antecedent state statutes are void usurps the state's historical primacy in education and fundamentally violates the federal-state balance so carefully struck in the Act.* Justice O'Connor has remarked that "[p]rinciples of federalism inherent in our constitutional system and the principle of grantee autonomy apply with special force when federal grant recipients are state or local

governments. *Dixson v. United States*, 465 U.S. 482, 509 (1984)(O'Connor, J., dissenting). Given Congress' intent behind IDEA, this is particularly true where the grant is in the area of special education.

In what this Court termed a "clear statutory directive," Congress, in the IDEA, left "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs . . . to state and local educational agencies in cooperation with the parents or guardian of the child." *Board of Education v. Rowley*, 458 U.S. 176 at 207 (1982). Congress, in passing the Act, "was aware of the states' traditional role in the formulation and execution of educational policy." *Rowley*, 458 U.S. at 207 n.30. In fact, Congress took pains in enacting the Act not to "displace the primacy of states in the field of education" but rather "to assist

them in extending their educational systems to the handicapped." *Rowley* at 208.

The First Circuit utilized this restrained view of federalism in examining Massachusetts' state standard. Refusing to examine the Massachusetts' legislature's intent and its ability to understand its own laws, the First Circuit examined which of the state's powers Congress intended to conserve, declaring: "We find no support in the legislative history of a congressional intention to supplant the states' historic direction of education within their boundaries." *Burlington, supra* at 785.

Building upon Congress' acknowledgement of the historical primacy of state standards and its emphatic intent that the federal government preserve this constancy through cooperative federalism, the *Burlington* court quoted from the legislative history of the Act: "Senator Stafford explained the Conference Committee bill to the Senate: 'Make no mistake, educating our children

is still very much a State responsibility, and this bill does not change that . . .,'" 121 Cong. Rec. 37411 (Nov. 19, 1975). *Burlington, supra* at 785, note 10. The *Burlington* court buttresses its opinion with a description of the delicate cooperative federalism inherent in the Act:

> The Act does not presume to impose nationally a uniform approach to the education of children with any given disability; it requires only that a "free appropriate . . . education," 20 U.S.C. section 1412(1), in conformity with the state's educational standards, 20 U.S.C. section 1401(a)(18), 20 U.S.C. section 1412(6), be provided to each disabled child

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[10] This Court stated in Rowley at 207-208, 102 S.Ct. at 3047-43:

> "Cooperative federalism" in this context, then, allows some substantive differentiation amon the states in the determination of which educational theories, practices, and approaches will be utilized for educating disabled children with a given impairment.

upon individualized evaluation and planning. *See* 20 U.S.C. section 1401(18)-(19) and Rowley 458 U.S.) *supra* at 200-04, 102 S.Ct. at 3047-50.

736 F.2d at 784.

b. *The Sixth Circuit's decision upsets the balance struck between the states and federal government of cooperative federalism and threatens to impose a nationally uniform approach to education by imposing a temporal condition upon state standards.* Congress chose cooperative federalism to conserve not only the historic role of the states, but higher standards developed by states exercising that role. As the First Circuit stated in *Burlington*:

> This asymmetrical approach is based upon the principles and policy of federalism which ground the Act, and more specifically, on the pivotal role of the state historically and as expressly recognized in the Act in setting

and enforcing the educational standards for its citizens. The local education agencies are subject to the state's legal authority, both as a general matter and per the operation of the federal Act. *See* 20 U.S.C. section 1431(a)(2); *see also* 20 U.S.C. section 1412(6). 736 F.2d at 792.

> The achievement of the federal Act's goal free appropriate public education for disabled children will occur primarily via state efforts. We believe this approach properly locates the federal interest at stake *and limits federal intrusion into the relations between states and their political subdivisions.* 736 F.2d at 792.

There is no greater intrusion in these relations than a federal court declaring a state statute void or lawless for a lack of legislative intent. This codifies a view Congress rejected, and threatens not

just the cooperative federalism approach of IDEA, but the wide spectrum of cases utilizing the cooperative federalism approach. *See Burlington* note 8 at 785 (recognizing that Congressional authorization for state law to supply the interstitial detail of federal statues and regulations is not novel. *Citing* 28 U.S.C. Section 1346(b)[Federal Tort Claims Act specifically makes situs state law applicable to determine the government's liability.] *see, e.g., Davis Warehouse Co. v. Bowles*, 321 U.S. 144 (1944); *Seaboard Air Line Ry. Co. v. Kenney*, 240 U.S. 489, 493-94 (1916)). Yet, in the face of Congress' stress upon cooperative federalism, the Sixth Circuit, in *Doe*, concluded that it could follow the clear language of the Tennessee General Assembly, only if it finds that the General Assembly can foretell the future:

> Unless we can attribute prescience to the Tennessee General Assembly, it is impossible to infer an intent to expand the federal

> scheme simply from the enactment of this statute when the language in question predates the federal scheme. But even if the legislature is not composed of seers capable of divining federal legislation-to be, it is possible that the legislature and courts indicated after the passage of the IDEA, that Tenn. Code Ann. 49-10-101(1)(a) was to be interpreted to impose a higher standard than the federal Act.

9 F.3d at 457-58.

Contrary to the Sixth Circuit's clearly stated view, there is no rule under the Constitution that burdens courts with the obligation to find that the Tennessee General Assembly is a fortune teller before it accepts the legislative statements at face value. This view of statutory construction flies in the face of the model set by this Court in *Smith v. Robinson, supra*, wherein this Court refused to make inferences that would disturb the carefully

woven mesh of state and federal law.

Says the First Circuit in *David D.*: "[w]e think, . . ., that Congress understood that the state educational agencies' standards are not *sui generis* or lawless, but must conform to the mandate of state statues as interpreted by *state* courts." 775 F.2d at 417, note 2 (emphasis added). Clearly, Congress intended to let alone that which was already there.

In short, the Sixth Circuit's ruling: 1) causes a de facto split of decisions in the Circuits, 2) usurps the role of state legislative branches in our political system, 3) unjustifiably intrudes on, unbalances, restates, and unravels the carefully woven special education statue of Tennessee, 4) threatens the cooperative federalism central to the Act, 5) guts hard-won rights clearly granted and more expansive than those granted by the federal government, and 6) overthrows accepted rules of statutory construction by placing am impermissible

judicial gloss on the Tennessee statute.

It may be that the Tennessee General Assembly will sometime conclude that it "bit off more than it could chew" and will strike the maximizing language from the statute. But if the maximization language is to be stricken, it should be done by the people's representatives, not by the federal court. In the present case, the Sixth Circuit strayed not just from the decisions of the First and Third Circuit, but from its own prior decision. In *Clevenger v. Oak Ridge School Board*, 744 F.2d 514, 515 (6th Cir. 1984), the Sixth Circuit accepted 49-10-101(a)(1) without treating it as an issue, but as a clear statement of the Tennessee General Assembly, protected by established rules of statutory construction.

3. The Sixth Circuit Ignored Basic Rules of Statutory Construction.

a. *It is axiomatic, in the absence of a legislative declaration to the contrary, that there*

should be a presumption that the Tennessee General Assembly intended the statute to be effective in its entirety. Williams v. Standard Oil Co. 278 U.S. 235, (1929) In *Turner v. Harris*, 281 S.W. 2d 661, 665 (Tenn. 1955) Tennessee's Supreme Court declared that generally, nothing which is not within the manifest intention of the Tennessee General Assembly as indicated by the statute itself may be read in to the statute. In this case there is no such demonstration of manifest intent from the Tennessee General Assembly.

b. *Since a state statute is not to be deemed repealed merely by the reenactment of another state statute on the same subject, it certainly should not be deemed repealed merely by the enactment of a subsequent federal statute on that subject. Pasadas v. National City Bank of New York*, 296 U.S. 497 56 S.Ct. 349 (1936); *Walling v. Patton-Tulley Transp. Co.* 134 F.2d 945 (6th Cir. 1943). In the absence of irreconcilable conflict,

there must be a clear expression of legislative intent to repeal the antecedent statute. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1976). Not only did Congress not intend to repeal state statues, *see, supra* at pg. 13; more importantly, there is no plain showing the Tennessee General Assembly intended Congress' Act to render the higher standard of section 49-10-101 void. To the contrary, common sense teaches the General Assembly intended to adopt a higher standard, regardless of later federal action.

c. *The Sixth Circuit's ruling ignores one fundamental reality: Had the Tennessee General Assembly wished to provide only minimal opportunities for handicapped children, the Tennessee General Assembly would not have used the term "maximize" in the first place.*

Legislative history reveals the maximization language of Section 49-10-101 to be more than accidentally chosen words by the Tennessee

General Assembly, unmindful of their importance. The legislative history of 49-10- 101, *et. seq.* shows the Tennessee General Assembly carefully considered its decision to impose a higher standard. As one legislator noted during the floor debate on Public Chapter 839, which was codified as section 49-10-101 *et seq.*, "this act is more comprehensive in its provisions than the legislation that any other state has now." *See* addendum Appendix L (Transcript of House Floor Debate, Public Chapter 839, 4/4/72), p. 5. Another legislator noted that the bill was aimed at developing maximum potential for handicapped children. *Id.*, p. 4.

The legislative history of 49-10-101 and the rules of statutory interpretation demand but one conclusion: it is inconceivable the Tennessee General Assembly was unaware of the full body of 49-10-101 *et. seq.* and its interplay with the federal Act and it is inconceivable the Tennessee General Assembly intended part of 49-10-101 to be void. It cannot be said that the Tennessee General Assembly did not know

when it accepted federal monies for programs funded under IDEA that it would have to meet the standards established by its educational agency. Further, under established rules of statutory construction, it cannot be said the Tennessee General Assembly did not know those standards encompassed the requirement that Tennessee school systems maximize the capabilities of her handicapped students. The Tennessee General Assembly is presumed to know of other statutes and court decisions germane to the subject it considers, *Aetna Life Ins. Co. v. Hooker*, 62 F.2d 805 (6th Cir. 1933); *Equitable Life Assurance Co. of U.S. v. Odle*, 547 S.W.2d 939 (Tenn. 1977), and it has often reconsidered 49-10- 101 *et.seq.* through the years. *See* Appendix M at p. 122a Nonetheless, the General Assembly has refused to do what the Sixth Circuit accomplished *de facto* in the present case -- repeal section 49-10-101(a)(1).

4. T*he Sixth Circuit's decision improperly*

repeals section 49-10-101(a)(1) by implication.

a. *With the stroke of a pen, the Sixth Circuit did what the Tennessee General Assembly for nineteen years, declined to do: it effectively repealed Section 49-10-101(a)(1).* It is the Tennessee General Assembly 's role to perceive and act upon a change in the wishes of Tennessee's citizens. If the Tennessee General Assembly so perceives, they may, at anytime, repeal section 49-10-101(a)(1) and merely track the language of the federal statute. However, in the last 19 years, the Tennessee General Assembly has refrained from doing so, despite cognizance of this section and ample opportunity to change the statue's clear language.

Through the years, the Tennessee General Assembly extended the coverage of the act, deleted coverage of the act and considered changes in the act containing 49-10-101(a)(1). Notably, there are sets of bills virtually identical, introduced every year from 1976 through 1980 even referencing the federal Act. But at

the time of the Sixth Circuit's decision, not one bill ever required reconsideration of the maximizing provision. Thus, the Tennessee General Assembly did not remain oblivious to the federal Act or oblivious to the provisions of 49-10-101(a)(1). For example, in 1978, the drafters specifically gave the Department of Education rule-making authority to implement the policy set out in T.C.A. 49- 2912, the predecessor to section 49-10-101.

b. *By voiding section 49-10-101(a)(1), the Sixth Circuit transformed the right to the higher state standard into an illusory right.* Such a transformation is contrary to the Sixth Circuit's own statutory pronouncements. *N.L.R.B. v. Tennessee Egg Co., 199 F.2d 95* (6th Cir. 1952)(the court will not ascribe to the Tennessee General Assembly an intent to confer an illusory right); *accord, Contreras v. U.S., 213 F.2d 96* (11th Cir. 1954). The Sixth Circuit's contention that the General Assembly would refrain from directing maximizing services had they known that Congress

would not require maximization in order to get federal grants, is without merit. If the General Assembly thought it was good policy to maximize services without federal help, there is no reason to infer that additional federal funds would cause them to abandon that attempt. Certainly a federal grant of money does not justify the federal judiciary's destructive intrusion into the province of the Tennessee General Assembly, eschewing the guideposts left by not just the General Assembly, but the Tennessee Department of Education and its own prior decisions.

At least one Tennessee Department of Education administrative decision since the federal Act's passage acknowledges the higher standard[11]. (Appendix K at

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[11] The only Tennessee decision, state or federal, prior to the present case in which a court had construed the language of §49-10-101 expressly recognized that the Tennessee legislature had mandated a "higher standard," that of maximizing the capabilities of handicapped children, "rather than the lower threshold level required by federal law . . ." *Krichinsky v. Knox County School*, 17 EHLR 725, 727 (E.D. Tenn. 1991) Appendix J at p. 180a. The court concluded that the Department of Education officer hearing the case had "correctly aplied the higher stated standards instead of the lower federal standard urged upon the court by the county school system. *Id.*

p. 196a) In that case, the parties did not place before the administrative judge the question of what programmatic attributes develop a handicapped child's maximum potential. Nonetheless, as it appears with the Sixth Circuit in *Clevenger*, the administrative law judge assumed, without discussion, that by failing to amend its earlier statue, the Tennessee General Assembly intended developing the maximum potential of every handicapped child to be the higher standard. Neither the Tennessee Department of Education administrative law judge nor the Sixth Circuit presumes the General Assembly ignorant of changes in the political climate since its passage of section 49-10-101(a)(1). However, had the General Assembly resided in ignorance of the changes in the political climate, their ignorance would not void that standard.

c. Changes in the political or public forum do not, by themselves, void an act. There is no

question the federal Act heralded a change in the political environment. What the Tennessee General Assembly would have done had it passed this Act after this change is subject to endless speculation, improper for consideration of legislative intent. *Nashville, C. & St. L. Ry. V. Baker*, 71 S.W. 678 at 680 (Tenn. 1934) presented the Tennessee Supreme Court with a situation similar to the present. In *Nashville, C. & St. L. Ry.*, the Defendant argued that post-statute circumstances invalidated a duty imposed by the statute in question. The court dismissed this argument and said:

> The question of whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions, or whether under existing circumstances have become unfair or inequitable, involves matter of legislative policy. . . . Courts cannot go into and consider such questions any more than they could consider

changed mental attitudes to determine the constitutionality or enforceability of a state.

Nashville, C. & St. L. Ry. at 680.

Whether changed economic and federal grant provisions, or existing unfair and inequitable circumstances renders 49-10- 101(a)(1) burdensome or unreasonable involves matters of legislative policy. Federal Courts, like state courts, cannot consider such questions.

Clearly, the Tennessee General Assembly has not allowed this statute to lie in the dusty attic of ignored statutes grounded in bygone eras. But, even if they did, under Tennessee law, obsolescence and oblivion do not repeal a statute and neither should a federal court.

5. *The Sixth Circuit glossed section 49-10-101(a)(1) with its own intent.* As this Court has recognized, "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what

it says there." *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992). That lack of ambiguity in the statute's language instructs that the "judicial inquiry is complete." *Connecticut Nat'l Bank* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The legislative history of section 49-10-101, along with its clear words reveal no traces of ambiguity justifying the Sixth Circuit's substituting its own political views for those of the Tennessee General Assembly. Thus, the Circuit court's strained interpretation of the statute is nothing less than an impermissible judicial "gloss" on the statute. *See Montgomery v. Hoskinds*, 432 S.W.2d 654, 655 (1968) (unambiguous statutes must be construed to mean what they say, and cannot be given another meaning by judicial construction).

The Sixth Circuit offers specious, political grounds to ignore explicit statutory requirements that are critical to the legislative scheme. Tacitly recognizing the cost of carrying out Tennessee General Assembly's

intent, the Sixth Circuit refers to maximization as a "Cadillac" education while claiming that a "Chevy" education would be sufficient. *Doe*, 9 F.3d at 459-460. By enunciating this policy, the Sixth Circuit Court ignores its own mandate set forth in *Clevenger v. Oak Ridge*, supra, that cost is not a consideration when devising programs for individual handicapped students. The Court further ignored the possibility that Tennessee sees not just the child but its fisc as the beneficiary of the higher state standard. Instead of basing its holding on specious automotive metaphors, the General Assembly may have seen maximizing special education as a way of avoiding later lifetime institutionalization. This view is no more speculative than the Sixth Circuit's since it is generally recognized people with disabilities can become taxpayers through education. Further, early intervention in disabilities through education, may reduce reliance on prisons, asylums, welfare

schemes and other long-term institutional care. Thus, the General Assembly may view the cost of maximizing services as minimizing future costs for other more costly state services.

In short, when the Sixth Circuit restricts its policy analysis to a "Chevrolet/Cadillac" dichotomy, it overlooks several other alternative policies that may have driven the General Assembly's maximization mandate.

Admittedly, the Respondents raised an interesting point before the Sixth Circuit when they asked the Court to strike down statutes passed by the Tennessee General Assembly prior to the encompassing federal Act. The maximization requirement will force Tennessee to provide a higher quality of education and, perhaps initially, expend more funds increasing its capabilities and purchasing outside services. This may or may not be imprudent and wasteful. It may or may not relieve demands on the overall fisc. But that is for the General Assembly to decide, not the federal

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judiciary.

Felix Frankfurther is reported to have said: "anyone who considers it proper for judges to turn so readily to their own notions of desirable policy as a guide to the meaning of a statute must lack the most rudimentary understanding of what separation of powers is all about; that such a view . . . is mischievousness, arrogance, irresponsibility, or all three." Isenburg, *Reminiscences of FF as a Friend*, 51 VA. L. REV. 564, 565 (1965). In 1987, this Court stated this point more formally when it decreed no occasion exists to examine additional considerations of policy that may have influenced lawmakers in formulation of a statute, if the language or provision is sufficiently clear in its context and not at odds with legislative history. *Rodriguez v. U.S.*, 480 U.S. 522 (1987). The Tennessee Supreme Court similarly stated,"[t]he courts cannot attempt to control legislative policy, nor can they inquire into the expediency, propriety,

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or even the justice of a statute which violates no provision of the Constitution." *Nashville, C. & St. L. Ry. V. Baker*, 71 S.W. 678 at 680 (Tenn. 1934). Why, therefore, should the Sixth Circuit Court do what the Tennessee Supreme Court refuses to do?

6. This Application For Certiorari Presents Questions Of Far-Reaching Public Importance.

a. *The Sixth Circuit's interpretation calls into question all state standards different from the Act.* If Respondents receive judicial sanction for refusing to follow the maximization language of the Tennessee statute, other local educational authorities and states surely will follow suit in an effort to save costs. The ultimate result will be near chaos in the law.

Tennessee departs from the federal Act in more than one way in defining special education services. For example, in 1972, Tennessee defined special education services to include services to the gifted, talented and emotionally maladjusted in addition to the maximization requirements. Since the passage of

the federal act, the General Assembly deleted some of these services, such as services to the socially maladjusted. However, the General Assembly retained the gifted and talented provisions up to today. T.C.A. 49-10-102(1)(a)

The Sixth Circuit's ruling will justify Tennessee school systems refusing to provide services or protections to gifted students under the federal Act. It will surely be but a matter of time before a Tennessee school system, relying upon the present case, will do just this. Unfortunately, this conflict in IDEA's brand of cooperative federalism will not dissolve when more Courts of Appeals have had an opportunity to deal with the same question.

b. *The Sixth Circuit's ruling will also contravene the freedom of states to adopt higher standards than those subsequently provided in federal law covering a range of subjects.* No longer may states expect federal courts to enforce antecedent statutes. *Perrin v. United States*, 444 U.S. 37 *(See, i.e.)* ("We hold that Congress intended

'bribery . . . in violation of the laws of the State in which committed' as used in the Travel Act to encompass conduct in violation of state commercial bribery statutes encompassed by not all states.) Clearly, this conflict will continue into the future in a substantial way.

Conclusion

Adoption of the Sixth Circuit's strained interpretation of section 49-10-101(a)(1) would thwart the Tennessee General Assembly 's clearly expressed intent that Tennessee have higher standards for the proper education of Tennessee's handicapped school children than the threshold standard mandated by federal law. The Sixth Circuit committed clear legal error in voiding the higher standard mandated by state law, and imposing upon Tennessee a standard clearly rejected by the Tennessee legislature, viz., the minimal standard mandated by federal law.

In the present case a grant of certiorari is important for three reasons. First, the Sixth Circuit's

decision is in direct and clear conflict with the First and Third Circuit's decisions. Second, a proper development of IDEA, indeed, all cooperative federalism statutes, requires that the questions posed by this case be answered. Otherwise the law itself will suffer if this question remains undecided. Finally, the Sixth Circuit's statutory interpretation is strained and completely at odds with the statue's plain language. Therefore, Petitioners respectfully request this Court grant their Petition.

Respectfully Submitted,

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FILED

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OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

JOHN DOE, BY AND THROUGH HER PARENTS AND NEXT FRIENDS JAMES AND MARY DOE,

Petitioners,

v.

THE BOARD OF EDUCATION OF TULLAHOMA CITY SCHOOLS; CHARLES EMBRY, Superintendent,

Respondents.

Appendix to

Petition For A Writ Of Certiorari
To The United States Supreme Court

BRIEF FOR PETITIONERS

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February, 1994

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APPENDICES

APPENDIX A

No. 92-5996

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DOE, a minor, by and through his next friends and his parents JAMES AND MARY DOE

Plaintiff-Appellant

vs.

THE BOARD OF EDUCATION OF TULLAHOMA CITY SCHOOLS; CHARLES EMBRY, Superintendent,

Defendants-Appellees

ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed November 5, 1993

Before: KEITH, GUY, and BATCHELDER, Circuit Judges.

PER CURIAM. John Doe, a minor, appeals the district court's judgement upholding an Administrative Law Judge's (ALJ) ruling that his parents are not entitled to reimbursement under the Individuals with Disabilities Education Act (IDEA or "Act"), 20 U.S.C. §§ 1400- 1485, for tuition expenses incurred from his enrollment at a private school. We AFFIRM the district court's decision denying John Doe's parents reimbursement.

I.

Appellant was enrolled in the Tullahoma, Tennessee, public school system until the fall of 1990, when he was placed by his parents in the Brehm School located in Carbondale, Illinois. The Brehm School is a private school specifically for children with learning disabilities. Prior to his transfer, appellant received no special education services.

In November of 1989, at his parent's request, appellant underwent a series of tests to determine if he suffered from any handicaps. The result of these tests indicated that appellant suffers from a neurological impairment that hinders his ability to process auditory information and engage in normal language and thinking shills. The tests also indicated that appellant has a full scale IQ of 130. The parties agree that, notwithstanding his unusually high IQ, appellant is handicapped within the meaning of the Act, and is therefore entitled to special education services.

After learning of appellant's newly discovered disability, the school district convened a multi-disciplinary team (M-Team) meeting on the last day of school, May 30, 1990. The parties agreed that after appellant selected his courses for the fall, another M-Team meeting would be held to effectuate the development of an individualized education program (IEP) for appellant.

Appellant never chose his courses for the fall. On June 10 or 11, 1990, appellant's mother contacted the Brehm School about enrolling him. A month later, appellant and his parents visited the Brehm School, and on July 18, appellant's parents requested another M-Team meeting and advised the school system that appellant would be attending the Brehm School. On August 7 the M-Team meeting was convened. Appellant and his parents claimed that the Brehm School was the only appropriate placement for his needs and that the Tullahoma public school system should be required to provide funding for his education at Brehm. The M-Team declined to create an IEP until further testing could be performed in the fall. On August 21, 1990, appellant filed an action for injunctive relief in federal district court, requesting that the school system be ordered to develop an IEP and provide funding for appellant to attend the Brehm School. The district court ordered the completion of an IEP for appellant.

Since appellant refused to select classes for the fall, the school chose them for him and had each of his teachers submit programs for his progress in each of his courses. The school system's proposed IEP rejected the parents' assertion that the Brehm school was the only appropriate placement and provided placement and provided that the appellant receive a variety of special services at the Tullahoma public schools. Appellant objected to the proposed IEP, again asserting that the Brehm school was the only appropriate placement. The school system's IEP was never implemented since the appellant began attending the Brehm School.

On September 18, 1990, a due process hearing was commenced before an ALJ of the Tennessee Department of Education to review the IEP and address the question of reimbursement. The ALJ concluded that the IEP was adequate and that appellant's parents were not entitled to reimbursement. The district court agreed.

II.

Appellant and his parents make a number of arguments in support of their contention that the Brehm School is the only appropriate placement for him. First, they argue that the Tennessee Special Education statue mandates a higher standard enunciate in the IDEA. Next, appellant and his parents contend that the IEP proposed by the Tullahoma Schools does not comport with the procedural and substantive requirements of the Act. Finally, they argue that the district court misconstrued the mainstreaming requirements of the Act.

A. THE TENNESSEE SPECIAL EDUCATION STATUTE

In this, and other circuits, it is settled that "even if a school district complies with federal law, it may still violate the [federal] Act if it fails to satisfy more extensive state protections that may also be in place." *Thomas v. Cincinnati Bd. of*

Education., 918 F. 2d 618, 620 (6th Cir. 1990); *accord David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 417 (1st Cir. 1985) (It is "beyond cavil that the federal [IDEA] standard explicitly incorporates some of a stat's substantive law") *cert. denied* 475 U.S. 1140 (1986); *Geis v. Board of Educ. of Parsippany-Troy Hills*, 774 F. 2d 575, 581, (3d Cir. 1985) ("[W]e find that the incorporation of state standards is explicit in the Act.")

In this case, the district court applied the standard for education of the handicapped announced in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court held that an IEP comports with the standards of the IDEA if it is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207. *Rowley* is the so-called "floor" for education of the handicapped; every IEP must rise to at least this level, but states may impose a higher standard if they choose.

Appellant contends that the Tennessee legislature chose to impose a higher standard than the federal Act, and manifested this intent by enacting the Tennessee Special Education statute. Their contention is based upon a reading of Tenn. Code Ann. § 49-10- 101(a)(1) (1990), which provides in pertinent part.

> Legislative intent -- Application of parts 1-6 -- (a)(1). It is the policy of this state to provide, and to require school districts to provide, as an integral part of free public education services sufficient to meet the needs and *maximize the capabilities* of handicapped children.

(emphasis added).

Initially, we noted that the "maximizing" language of Tenn. Code Ann. § 49-10-101 (1)(a) was passed as Act of April 13, 1972, ch. 839, 1, 1972 Tenn. Pub. Acts 1523, to take effect July 1, 1972. However the federal Act, Pub. L. No. 94-142, was

enacted November 29, 1975, to take effect October 1, 1977. Unless we can attribute prescience tot he Tennessee legislature, it is impossible to infer an intent to expand the federal scheme simply from the enactment of this statute when the language in question predates the federal scheme. But even if the Tennessee legislature is not composed of seers capable of divining federal legislation-to-be, it is possible that the Tennessee legislature and courts indicated *after* the passage of the IDEA, that Tenn. Code Ann. § 49-10-101 (1)(a) was to be interpreted to impose a higher standard than the federal Act.

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[1]Appellant cites *Krichinsky v. Knox County Sch.*, 17 Educ. H.L. Rep. 725, 727 (E.D. Tenn. 1991), in which the federal district judge, without citation to any Tennessee case law or legislative history, held that the Tennessee Special Education statute imposes a higher standard mandated by the Tennessee legislature... rather than the lower, threshold level required by federal law... " *Id.* The district court in the case at had disagreed with the *Krichinsky* court:

> Plaintiff contends that the requirements place (sic) on Tennessee school systems are... higher than those required by the federal Act. The court disagrees. There is no legislative history or case authority indicating that the Tennessee legislature

However, there are no Tennessee state court decisions interpreting the special education statute in the manner suggested by the appellant; the only two federal district court decisions that address the issue arrive at diametrical conclusions,[1] and there is no legislative history or administrative pronouncement which supports the appellant's position. In short, there is no hard evidence to indicate that the Tennessee legislature intended anything more than to remedy the past inadequacies of educational opportunities offered to the handicapped.

We acknowledge that other circuits have found state special education statutes to impose a higher standard than the federal law[2]; however, we do not

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intended its Act to place higher standards on the school system than the federal Act. The "maximization" language appears only as an objective or goal stated in the introductory provisions of the state Act.

[2]See *David D. v. Dartmouth Sch. Comm.*, 775 F. 2d 411, 423 (1st Cir. 1985), ("Massachusetts law mandate[s] a level of

find such a holding to be justified in this case.

B. SUBSTANTIVE AND PROCEDURAL REQUIREMENTS OF THE ACT

1. *The Standard of Review*

The standard of review for actions brought under the Act is a modified *de novo* review. In *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982), the Supreme Court indicated that a complete *de novo* review is inappropriate. Quoting *Rowley*, this Court has held, that the language in the Act "is by no means and invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they

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substantive benefits superior to that of the federal Act...") cert. denied 475 U.S. 1140 (1986); *Geis v. Board of Educ. of Parsippany-Troy Hills*, 774 F. 2d. 575 (3d Cir. 1985) (deciding that the New Jersey Special Education statute imposes a higher standard on the state's school systems than does the federal Act); *Barwacz v. Michigan Dept. of Educ.*, 674 F. Supp. 1296 (W.D. Mich. 1987) Michigan Special Education statute creates a higher standard than the federal minimum). But see *Buchholtz v. Iowa Dep't of Pub. Instruction*, 315 N.W.2d. 789

review....." *Thomas*, 918 F. 2d at 624. This Court has determined that *Rowley* "requires a *de novo* review [of the due process hearing] but that the district court should give due weight to the state administrative proceedings in reaching its decision." *Roncker ex. rel. Roncker v. Walter*, 700 F. 2d 1058, 1062 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983).

This Court has determined that appellant and his parents bear the burden of proving by a preponderance of the evidence that the IEP devised by the Board is inappropriate. *Cordrey v. Euckert*, 917 F.2d 1460, 1469, (6th Cir. 1990); see also *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990).

2. *The Alleged Procedural Violations*

Appellant and his parents contend that the proposed IEP violated the procedural requirements

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(Iowa 1982) (holding that the Iowa Special Education statute specifically did not require a higher standard than the federal Act.).

of the Act. We are satisfied that the district court's analysis met the standard set forth in *Doe v. Defendant I*, 898 F.2d at 1190 (6th Cir. 1990), where this court held "courts must subject IEPs to strict review when determining whether they are procedurally deficient." We find no error in that analysis[3], and we do not see that a revisitation of it would be beneficial.

3. *The Alleged Substantive Violations*

The IDEA requires that a state provide a "free appropriate public education" (FAPE) to all handicapped children within its jurisdiction, as a condition for receiving federal funds. While the Supreme Court has held that states are not required to "maximize the potential of handicapped children," *Rowley*, 458 U.S. at 189; *accord Thomas*,

[3]While we note that some of the dates in the district court's findings of fact are incorrect as to the year, it is clear that these errors are typographical and that the district court relied on the actual chronology in making his factual finding and legal conclusions.

918 F.2d at 626, this Court has held that the educational benefits the state does provide must be more that *de minimis* in order to be "appropriate." *Doe By and Through Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989). The Act provides no more than a "basic floor of opportunity....consist[ing] of access to specialized institutions and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 201; *Doe*, 879 F.2d at 1341.

The question with which we are now faced, and which we consider under the modified standard of *de novo* review laid out above, is whether the IEP proposed by the Board was "reasonably calculated to enable [appellant] to receive educational benefits." Appellant and his parents assert that the proposed IEP is "woefully inadequate" to meet appellant's needs. We disagree.

The IEP proposed by the Board appears to be a good faith effort to propose and educational program

"reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207. Specifically, the M-Team recommended,

> that a comprehensive physical, psychological and intellectual testing of the plaintiff be done at the Vanderbilt University Medical Center; that an inservice program on learning disabilities be held for all school staff members involved in implementing plaintiff's IEP; that oral testing be used for the plaintiff with regard to essay, lengthy written assignments and projects, but that he continue to take objective tests and short answer response tests; that plaintiff utilize a tape recorder for recording class lectures; that plaintiff be provided one hour of language therapy each day, planned by a qualified speech/language pathologist; that a school guidance counselor be available before, during or after school to provide individual

counseling sessions, initially twice per week; that counseling services be provided after school hours by a non-school system employee experienced in counseling disabled teenagers; that a home-bound teacher be available for plaintiff if he missed more than ten consecutive school days; that computer-assisted instruction be utilized for plaintiff in English and Mathematics; that word processing be introduced to the plaintiff to help compensate for his written language deficiencies; that an IEP coordinator monitor the implementation of the program; that monthly conferences be held to review progress, plan course work for the next four weeks, and discuss learning strategies; and that tutorial services be available four days per week after regular school hours.

This IEP is aimed at addressing the particular

disabilities from which appellant suffers. While the Brehm School undoubtedly can provide superior services aimed exclusively at helping learning-disabled children such as appellant, this is not what the Act requires. This is especially true where, as here, "the IEP was never given a chance to succeed." *Doe v. Defendant I*, 989 F.2d at 1191.

The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Cheverolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA.

4. *The Least Restrictive Environment Requirement*

Title 20 U.S.C. § 1412(5)(B) requires states to ensure that handicapped children are educated "to the maximum extent appropriate" with children who are not handicapped. The Tennessee statute provides that "[t]o the maximum extent practicable, handicapped children shall be educated along with children who do not have handicaps and shall attend regular classes." Tenn. Code Ann. § 49-1-103 (1990).

The district court held that the IEP developed for appellant by the M-Team represented a "less restrictive alternative" for him than the Brehm School. Appellant contends that the district court misapplied the "mainstreaming" requirement by assuming that it is absolute.

In *Roncker on Behalf of Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), this Circuit set out its interpretation of the mainstreaming requirement of the federal Act:

> The Act does not require mainstreaming in every case but is requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference. The proper inquiry is whether a proposed placement is appropriate under the Act.

However, this Court recognizes that even though the preference for mainstreaming is very strong there are still situations in which,

> some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a

disruptive force in the non-segregated setting. *Id.*, at 1063.

Appellant does not fall within any of these categories. The record does not support a finding that the benefits to appellant from mainstreaming would have been marginal or that the specific services which he needed could not feasibly be provided in the non- segregated setting, much less that the benefits to appellant from such services provided in a segregated setting would far outweigh the benefits from mainstreaming. Indeed, the feasibility of providing those services in the non-segregated setting is demonstrated by the specialized and detailed IEP created by the M-Team. Finally, there is no mention in the records of appellant's being a "disrupted" child. Under these circumstances, the Act mandates that among "appropriate" placements the least restrictive alternative must be chosen.

While the Brehm school is certainly an

appropriate, and in some respects even a superior, placement, it is clearly far more restrictive than the IEP proposed by the Board. All students at the Brehm School are learning disabled, handicapped children; that school therefore provides a child no opportunity for educational interaction with non-handicapped students.

The school system's proposed placement, on the other hand, offers the child an appropriate placement in a setting that is essentially a modified mainstream educational setting, allowing maximum contact with non-handicapped children. The district court did not err in holding that the IEP proposed by the Board was the least restrictive, appropriate placement for appellant.

5. *Reimbursement of Tuition*

Finally, we turn to whether appellant's parents are entitled to reimbursement for the cost of tuition for the Brehm School. With regard to

reimbursement for private school tuition, the Supreme Court held: "If the court [] ultimately determine[s] that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement....." *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 374 (1985). This Court stated in *Doe v. Defendant I*, 898 F.2d at 1192:

> Because we have determined that appellant's IEP was appropriate, he is not entitled to reimbursement for the cost of private schooling. Appellant's parents removed him from the free public school and placed him in a private school at their own peril. They are responsible for the cost of doing so.

Appellant's parents assumed the risk of the responsibility for the cost of appellant's private education by removing appellant from the Tullahoma schools without ever giving the proposed

IEP a chance. We find the IEP was adequate and the Tullahoma public schools are an appropriate placement. As a result, appellant's parents are not entitled to reimbursement for the tuition expenses of the Brehm School.

III.

We hold that the Tennessee Special Education statute does not mandate a higher standard than federal law, that the IEP proposed by the Tullahoma schools was adequate, and that it is also represented the least restrictive appropriate environment. Therefore, we AFFIRM the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DOE, a minor, by and through his parents and next friends, James and Mary Doe,

Plaintiff - Appellant

No. 92-5996

vs.

THE BOARD OF EDUCATION OF TULLAHOMA CITY SCHOOLS; CHARLES EMBRY, Superintendent of Schools, Tullahoma, Tennessee,

Defendants - Appellees

Before: Keith, Guy, and Batchelder, Circuit Judges

JUDGEMENT

ON APPEAL from the United States District Court for the Eastern District of Tennessee at Winchester.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the judgement of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/ss/ LEONARD GREEN, CLERK

A True Copy.

Attest:

/ss/ DEPUTY CLERK

ISSUED AS MANDATE: 12/13/93

COSTS: $ 60.55

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

AT WINCHESTER

John DOE, a minor, by and through
his parents and next friends,
James and Mary DOE,

Plaintiffs

vs. No. CIV-4-90-0168

THE BOARD OF EDUCATION OF TULLAHOMA CITY SCHOOLS,
Charles EMBRY, Superintendent of Schools,
Tullahoma, Tennessee, and Bob TIPPS,
in his official capacity as the
Right to Education Officer of the State of Tennessee,

Defendants

Memorandum Opinion

This is an action under the Individuals with Disabilities Act, 20 U.S.C. §1400, *et seq.* Plaintiff seeks review of an administrative determination that defendants have no liability for plaintiffs placement in a private school for children with learning disabilities. At issue is whether the defendant school system responded appropriately to the minor plaintiff s learning disability. This matter was heard *de novo* by the court based upon the administrative record and other evidence on April 29, 1992. I find that the school system responded appropriately. The following constitutes this court's findings of fact and conclusions of law in conformity with Rule 52, Federal Rules of Civil Procedure.

I.

Findings of Fact

1. The plaintiff is a 17-year-old male enrolled in the Tullahoma City school system until the fall of 1990, when he was placed by his parents in the Brehm School for children with learning disabilities in Carbondale, Illinois. Prior to his transfer, plaintiff had received no special education services. The school system had suspected a learning problem when he was in the second grade, but, following testing, he was found not to be in need of special education services. Nevertheless, he was held back a grade because of his failure to master second grade skills. In the following years plaintiff made average to poor grades, but passed each year.

2. In November, 1989, plaintiff made a "suicidal gesture" by inflicting a minor cut on his wrist. As a result, he was referred to a Tullahoma psychiatrist who determined that hospitalization was not necessary. Soon after, plaintiff's parents

advised the school system that he was experiencing problems, without describing the precise nature of the problems, and requested that he not be placed under stress. His parents later advised the school system that plaintiff was undergoing extensive testing to identify the nature of his problem.

3. The result was testing on plaintiff by a clinical psychologist, Dr. Judith Kaas-Weiss. Dr. Kaas-Weiss concluded that plaintiff was learning disabled in the area of written language expression. Specifically, he suffers from a neurological impairment which hinders his ability to process auditory information and engage in proper language and thinking skills. The parties have agreed that plaintiff is handicapped within the meaning of the Act and is therefore entitled to special education services. Dr. Kaas-Weiss recommended that plaintiff be allowed to take his tests orally, give oral reports or dictate extensive written reports, use a tape recorder instead of note-

taking, and use word processing.

4. The school district arranged for a multidisciplinary board (M-Team) meeting on the last day of school, May 30, 1990, which was attended by Dr. Kaas-Weiss and plaintiff's mother. At the meeting, plaintiff's mother was given written notice of her parental rights. The school district agreed that plaintiff was learning disabled, but did not agree that he satisfied the State Board of Education criteria for giftedness. The parties further agreed that after plaintiff had selected his curriculum for the fall, another M-Team meeting would be held to continue the evaluation process, leading to certification as learning disabled and the development of an individualized education program (IEP) for the fall. The school district decided to implement some of the interventions suggested by Dr. Kaas-Weiss.

5. Plaintiff never chose his courses for the fall semester. On June 10 or 11, plaintiff's mother

contacted the Brehm School about enrolling him, and during the week of July 18 the parent and child visited Brehm. On July 18, the parents requested another M-Team meeting and advised the school system that plaintiff would be attending the Brehm School.

6. On August 7, the M-Team meeting was convened. Plaintiff and his parents claimed that Dr. Kaas-Weiss's report showed that the Brehm School was the only appropriate placement for him. During the M-Team meeting, the school district concluded again that plaintiff was learning disabled, but would not create an IEP until he could be further tested in the fall.

7. On August 21, plaintiff filed an action for injunctive relief in this court seeking a declaration that defendants had failed to identify him as handicapped, failed to develop an appropriate IEP, and effectively denied him a free appropriate education as required by the Act. Plaintiff

requested that defendants be ordered to develop an IEP for him and be ordered to provide funding for him to attend the Brehm School.

This court ordered defendants to conduct an M-Team meeting and complete an IEP for the plaintiff. That M-Team meeting was convened on September 5, 1990. It resulted in the creation of an IEP wherein the school system recommended that plaintiff remain in the Tullahoma City School System. The school system recommended that a comprehensive physical, psychological and intellectual testing of the plaintiff be done at the Vanderbilt University Medical Center; that an in-service program on learning disabilities be held for all school staff members involved in implementing plaintiff's IEP; that oral testing be used for the plaintiff with regard to essay, lengthy written assignments and projects, but that he continue to take objective tests and short answer response tests; that plaintiff utilize a tape recorder for

recording class lectures; that plaintiff be provided one hour of language therapy each day, planned by a qualified speech/language pathologist; that a school guidance counselor be available before, during or after school to provide individual counseling sessions, initially twice per week; that counseling services be provided after school hours by a non school system employee experienced in counseling disabled teenagers; that a home-bound teacher be available for plaintiff if he missed more than ten consecutive school days; that computer-assisted instruction be utilized for plaintiff in English and Mathematics; that word processing be introduced to the plaintiff to help compensate for his written language deficiencies; that an IEP coordinator monitor the implementation of the program; that monthly conferences be held to review progress, plan 1090 course work for the next four weeks, and discuss learning strategies; and that tutorial services be available four days per

week after regular school hours. Since the plaintiff refused to choose classes for the fall, the school system chose courses for him and had each of his teachers submit proposed programs for his progress in each of his courses. The plaintiff objected to the IEP proposed by the defendants and again insisted that Brehm was the only acceptable placement The school system's IEP was never implemented since plaintiff began attending the Brehm School.

8. On September 18, 1990, a due process hearing was commenced before an administrative law judge of the Tennessee Department of Education to review the school system's proposed placement of the child and address the question of whether the school system should reimburse plaintiff for the cost of placement at Brehm.

A number of experts testified at the hearing before the Administrative Law Judge regarding the plaintiff's learning disability and the appropriate placement of him. Dr. Morris Lovejoy testified that

plaintiff had a neurological deficit which interfered with his ability to process information. The psychologist Dr. Judith Kaas-Weiss, testified that the IEP proposed by the school system for plaintiff would be inadequate in a number of ways, particularly in that it failed to accurately measure the plaintiff's level of functioning and it provides no method for evaluating the plaintiff's progress. Joan Cosgrove, an expert in speech language pathology, testified that plaintiff would be unable to obtain a 24-hour a day integrated program which he needed in the Tullahoma public school and that the Brehm School would be an appropriate placement Richard Hudson, a psychotherapist who works with Dr. Lovejoy, testified that plaintiff needs 24-hour per day training, which can only be provided at a school such as Brehm.

9. Several of plaintiff's teachers testified regarding the individual treatment that the plaintiff would receive under the IEP should he

attend the Tullahoma school. Karen Hunsaker, a psychological examiner employed by the Tullahoma City Schools, testified regarding the individual psychological services that would be provided for the plaintiff under the IEP. She testified that many adolescents are upset by being taken away from their family and friends.

10. There is no dispute that plaintiff has a neurological impairment which interferes with his ability to process information received in the classroom. It is also clear that a school such as Brehm, a 24-hour per day boarding school specifically for children with learning disabilities, is in many ways superior to any program an ordinary public school can provide. The parties disagree, however, over whether the placement proposed by the school system is adequate. The administrative law judge found that the parents ' proposed placement at the Brehm School would be a highly restrictive environment where all students are

learning-disabled. He further found that the school system's proposed IEP offered the plaintiff an appropriate education in an essentially modified mainstream setting. Accordingly, the ALJ concluded plaintiff was not entitled to reimbursement for expenses incurred in going to the Brehm School.

11. Upon a *de novo* review of the administrative record and the proof heard at trial, this court is in agreement with the administrative law judge that the IEP proposed by the defendants was an appropriate placement of the plaintiff and a less restrictive alternative to placement at the Brehm School. Brehm may have been a superior placement as far as maximizing plaintiff's educational potential, but the IEP offered by the school system was at least an appropriate one. Although a parent's desire to obtain for a child the best possible education is understandable, the State is not required to provide it. It is only

required to provide an education appropriate for the unique needs of the particular child. The State's proposed plan was never given an opportunity to operate in this case. Accordingly, I find that plaintiff is not entitled to reimbursement for the expense incurred at the Brehm School.

Conclusions of Law

1. The Education for All Handicapped Children Act assures that all handicapped children have available to them "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" .. . 20 U.S.C. §1400(c). The Act also defines a "free appropriate public education" to include "special education and related services which ... have been provided at public expense ... [and] in conformity with the individualized education program required under Section 1414(a)(5) ..." 20 U.S.C. §1401(a)(18)(A).

2. This court's review of the due process hearing is *de novo*, but the United States Court of Appeals for the Sixth Circuit has determined that the district court should give due weight to state administrative proceedings. *Doe v. Smith*, 879 F.2d 1340, 1343 (6th Cir. 1989), cert. denied, U.S., 110 S.Ct. 730 (1990).

3. A district court reviewing an appeal brought under 20 U.S.C. §1415(e)(2) must face the two-step inquiry mandated by *Board of Education v. Rowley*, 458 U.S. 176,206-07 (1982)The first step is whether the state has complied with the Act's procedural requirements. Id. The second step is whether the IEP developed through the Act's procedures is "reasonably calculated to enable to child to receive educational benefits." *Id.* According to *Rowley*, in order to satisfy its duty to provide a free appropriate education, "a state must provide personal instruction with sufficient support services to permit the child to benefit educationally

from the instruction." *Id.* at 203. The educational benefits do not have to maximize a child's potential but must only offer a "basic floor of opportunity" which will allow the child to progress with his education. *Id.* at 201.[1]

4. Plaintiff alleges multiple violations of the procedural requirements of the Act. First he alleges that no M-Team meeting was held when he was identified as suffering from learning difficulties in the second grade. However, there was no proof that defendants had sufficient evidence to conclude that plaintiff was handicapped by a learning disability in the second grade and therefore should have conducted an M-Team meeting. Not every child who repeats a grade is necessarily "handicapped."

Plaintiff also contends that no effort was made to inform his parents of their rights under the Act until May 30, 1991, and that information should have been provided no later than January, 1990.

However, defendants did not receive Dr. Kaas Weiss's report until March or April, 1991; they had no reason to identify the plaintiff as handicapped until the M-Team meeting was convened on May 30, 1991.

Next plaintiff contends that defendants ignored the change of placement provisions of 34 C.F.R. 300.504 plaintiff out of an algebra class in March, 1991. However, at that point, as noted above, plaintiff had not been identified as handicapped and there would be no reason for the change of placement provision for allowing plaintiff to simply drop a class.

Plaintiff contends that defendants failed to assess him in violation of 34 C.F.R. §104.35(a), which requires defendants to conduct an evaluation to determine a child's educational needs after identifying him as handicapped. However, an evaluation had already been performed by Dr. Kaas-Weiss and defendants were willing to

implement many of the suggestions Dr. Kaas-Weiss made based upon that evaluation. Moreover, defendants were willing to conduct further evaluations once the fall semester began, but plaintiff refused to participate in those evaluations.

Plaintiff contends that Dr. Covington refused to prepare an IEP until he was evaluated in the fall in violation of 34 C.F.R. §300.340-300.349. Nothing in the procedural requirements of theregulations require the production of the IEP before the M-Team meeting could reasonably be convened and classroom observations of the plaintiff made by those participating in the M-Team. Since plaintiff's teachers were not all at school during the summer, it was reasonable for Dr. Covington to decline to create another M-
Team meeting and create an IEP until school began in the fall.

Plaintiff contends that Dr. Covington violated 34 C.F.R. §300.504 in stating that plaintiff would

repeat the prior grade. That regulation provides for written parental notice before a change in the educational placement of a child can be made. The proposed IEP provided plaintiff's parents with written notice that plaintiff would be repeating the 11th grade if he attended the Tullahoma public school in the fall. I conclude that that notice fulfilled the requirements of 34 C.F.R. §300.504.

Plaintiff contends that defendants' IEP failed to follow the recommendations of the evaluative and treating clinicians. However, nothing in the regulations requires the IEP to adopt all of the recommendations of the plaintiff's experts. The court notes that most of the recommendations of Dr. Kaas-Weiss are contained in the IEP.

Plaintiff also points out that the defendants were required to produce an annual IEP whether the plaintiff was made available for testing or not. Such an IEP was produced in this case. The court concludes that defendants produced an IEP

reasonably quickly under the circumstances, after plaintiff had been identified as handicapped. The parents refusal to make plaintiff available for testing made production of that IEP even more difficult. The court concludes that plaintiff has failed to demonstrate that defendants failed to comply with the procedural requirements of the ACL.

Plaintiff contents that the IEP proposed lacks any method of measuring plaintiff's progress under the plan. I disagree, although the proposed evaluation methods are general. They provide for monthly conferences to review present progress. They also provide for oral testing on essay tests and the plaintiff would continue to take objective and short answer tests. Therefore, the IEP does contain methods for measuring plaintiff's progress.

5. The Act provides that a handicapped child is to be educated with non-handicapped children to the maximum extent possible. 20 U.S.C. §1412(5)(B). The Act prefers a less restrictive

placement, even if a more restrictive placement might actually be superior. *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983). I conclude that although both the IEP and Brehm School would have been appropriate placements in this case, the ALJ correctly determined that the IEP was a less restrictive and therefore proper placement for the plaintiff. The court concludes that plaintiff is not entitled to reimbursement from the defendants for the placement at the Brehm School.

Conclusion

In light of the foregoing, judgment will enter in favor of the defendants and the plaintiff is not entitled to reimbursement for expenses incurred in attending the Brehm School.

Order accordingly.

[1] The plaintiff argues that under Tennessee law local school systems are required to provide

children with special education services sufficient to meet the needs and maximize the capabilities of handicapped children. T.C.A. §49-10-101(a)(1) (1972). Plaintiff contends that the requirements place on Tennessee school systems are therefore higher than those required by the federal Act. The court disagrees. There is no legislative history or case authority indicating that the Tennessee legislature intended its Act to place higher standards on the school system than the federal Act. The "maximization" language appears only as an objective or goal stated in the introductory provisions of the state Act.

/s/ James H. Jarvis
JAMES H. JARVIS
Judge, U.S. District Court

[Entered 5-29-92]

cc: Counsel of Record
Tricia Dennis
John Kitch
Frank Van Cleave

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

JOHN DOE, a minor, by and through
his parents and next friends,
James and Mary Doe
PLAINTIFF

VS. Civ. 4-90-0168

THE BOARD OF EDUCATION OF TULLAHOMA CITY SCHOOLS, CHARLES EMBRY, Superintendent of Schools, Tullahoma, Tennessee and BOB TIPPS, in his official capacity as the Right of Education Officer of Tennessee,
DEFENDANTS

ORDER

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, it is

hereby ORDERED that plaintiff take nothing in this action, that judgement ENTER in favor of defendants, and the actions is DISMISSED.

[ENTERED 5-9-92]

/s/_____

James H. Jarvis

UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

Tricia Dennis

John Kitch

Frank Van Cleave

APPENDIX E

BEFORE THE

TENNESSEE DEPARTMENT OF EDUCATION

November 19, 1990

No. 90-36

Tullahoma City Schools

Counsel for Parents: Carla A. Hudson and Tricia Dennis, Wolfe, Hudson and Dennis, 615 Houston Street, Chattanooga, TN 37403.

Counsel for School System: Frank Van Cleave, Ray and Van Cleave, 111 North Atlantic Street, Tullahoma, TN 37388, and John D. Kitch, Kitch, Deas and Klein, 2300 Hillsboro Road, Nashville, TN 37212.

Administrative Law Judge: J. Randall LaFevor

The parents of a 17-year-old student with a learning disability in written language expression challenged the district's proposal to provide their son a modified regular education

program with psychological counselling. After a reconvened M-Team reaffirmed the proposal, the parents unilaterally enrolled their son at a private residential school. The parents then initiated due process proceedings to request reimbursement and continued placement at the private school.

HELD: for the district.

The hearing officer held the maximizing language in the preamble to the state's special education law, enacted prior to the passage of the EHA, was insufficient to infer a legislative intent to expand the state's special education requirements beyond federally mandated standards. Thus, the proposed educational program only needed to provide the student with a "basic floor of opportunity." Finding that the district's proposal addressed all of the student's identified needs, the hearing officer concluded that the district offered both an

appropriate program and placement in the least restrictive environment, in accordance with state and federal law. The parents' request for continued private school placement and reimbursement of the private school costs was, therefore, denied.

Final Order

I. Procedural History

The request for this Due Process Hearing was filed on September 10, 1990 on behalf of the Child and Parents following a Federal Court Order which directed the School System to conduct a Multidisciplinary Team (M-Team) meeting and to develop an Individualized Educational Program (IEP) for the child. That Order further provided that, if the parents were dissatisfied with the System's proposed IEP, a Due Process Hearing was to convene within ten (10) days after the parents notified the System

of their opposition. In compliance with the Federal Court's Order, this hearing was convened on September 18, 1990, and testimony continued on September 19 and October 2, by agreement of the parties. Post-Hearing briefs were submitted upon a schedule approved by the parties, and the 45-day rule for rendering a Final Order was waived by both parties.

II. Facts

The child involved in this case is a 17 year-old male who was enrolled in the Tullahoma City School System until the fall of 1990, when he was unilaterally placed by his parents in the Brehm School in Carbondale, Illinois. Until the spring of 1990, he had received no special education services from the System, which had suspected a problem only once previously, in the second grade. At that time, following testing by the System, he was found not to be in need of

services, but was retained due to his failure to master the necessary second grade skills. In November, 1989 the child made a "suicidal gesture" by inflicting a minor cut to his wrist, an injury which did not require medical attention. He was referred to a psychiatrist in Tullahoma who met with him, determined that psychiatric hospitalization was not indicated, and released him to his parents for further contacts with his office as needed.

Soon thereafter, the child's parents advised the School System that the child was experiencing problems, without revealing the nature of the problems, and asked that his teachers reduce pressure on the child which might be generated by the school setting; the System complied and did not pursue an explanation of the basis for this request. The parents later advised the System that the child was undergoing extensive testing to pinpoint

the nature of his problem.

The results of the testing by a clinical psychologist in Nashville were forwarded to the school and received some time in late April or May, 1990, indicating that the child was learning disabled in the area of written language expression and proposing specific recommendations for addressing the identified problem. At the parents' request, an M-Team was convened on May 30, 1990, attended by the System's representative, the child's mother and the child's clinical psychologist. The M-Team agreed with the proposed certification as learning-disabled, and adopted the psychologist's recommendations, including oral testing, oral or dictated reports in lieu of written reports, use of a tape recorder instead of note taking, use of a word-processor, and vocational exploration prior to graduation. Since the school year was concluding, the M-Team agreed that

the process of evaluation, certification and specific IEP development would continue in the fall, after the child had selected his fall semester curriculum and after the required classroom observation had been completed. A second proposed certification as "gifted" was not accepted by the M-Team, because the child had not met the requirements of the State's certification regulations.

During the summer, the child enrolled in a math class and did some make-up work to earn a grade in English; at least one other teacher went back to re-compute the child's class average, following the M-Team, based only on the work that he understood the child was capable of performing, resulting in a final grade of a "B," instead of a "D."

Also during the summer, the child's parents contacted and applied for the child's admission to the Brehm School, a private

residential institution for the learning disabled in Carbondale, Illinois. After sending a $1,000.00, non-refundable deposit to the Brehm School, the child's parents requested another M-Team. The System convened the M-Team on August 7, 1990. The System's position was the same as it had been following the May 30 meeting; the parents insisted on placement of the child at the Brehm School.

On August 21, 1990 the child's parents filed suit in Federal Court rather than proceeding to a Due Process Hearing, asking that the Court order the School System to enroll the child in the Brehm School. While declining that request, the Court ordered another M-Team meeting at the request of the child's parents, to be attended by the child's psychiatrist; ordered the System to develop an IEP, taking the child's experts' reports into account; and ordered an expedited Due Process

Hearing, if necessary. The Federal Court Judge expressed his belief that an appropriate educational program for this child could be designed without the necessity of sending him away from home.

The ordered M-Team meeting occurred on September 5, 1990, where consideration was given to the recommendations of the child's experts. The child's psychiatrist was asked to suggest methods of dealing with his handicaps, but refused to provide the requested input. The child's parents continued to demand placement at the Brehm School. The School System presented its plan through some of the personnel who would be responsible for implementing it. Others, the System proposed, would be contracted from outside the System to provide additional specific expertise. This plan was reduced to writing and became the System's proposed IEP.

As of September 10, 1990, the child has been attending the Brehm School, where he was unilaterally placed following the M-Team meeting.

III. Issues

1. Is the child handicapped within the meaning of the Federal and State laws?

2. If the child is handicapped, which proposed placement will provide the child with a Free Appropriate Public Education?

IV. Certification of Handicapping Condition

The proof amply demonstrates, and the School System concedes, that the child is certifiably handicapped as learning disabled in the area of written language expression.

The parents have asserted that he is also certifiable as a "gifted" child under state law.

The proof has failed to establish that the necessary criteria for such a certification has been met. *The Tennessee Administrative Policies and Procedures*, adopted as part of the state's special education law pursuant 34 C.F.R. 300.530, and which implement *Tennessee Rules, Regulation.s and Minimum Standards*, provide that two of three criteria must be met before a child may be certified as gifted: (1) intellectual functioning and ability which measure at least two standard deviations above the mean; (2) superior academic or achievement ability which measures at the 96th percentile or above in one or more major academic areas; (3) and superior intellectual ability demonstrated by the child's ideas and projects related to one or more academic fields. *Tennessee Administrative Policies and Procedures Manual*, IV. 17.18, pp. 35-36.

While it is undisputed that the child is of superior intelligence, the gifted certification is not awarded on that basis alone. In the absence of proof sufficient to demonstrate satisfaction of one of the remaining two criteria, the requested additional certification cannot be conferred. This is not to say that the child's educational placement should ignore his intellectual ability, but should take advantage of this asset when planning his program.

V. Appropriateness of the Proposed Program Placements

A. Appropriateness

A special education program is appropriate if it is "reasonably calculated to enable the child to receive educational benefits". *Board of Education v. Rowley*, 458 U.S. 176, 2067, 102 S.Ct. 3034, 3050-51, 73 L.Ed.2d 690,

712 (1982); *Clevenger v. Oak Ridge*, 573 F. Supp. 349 (E.D. Tenn. 1983). The program "need not maximize the child's potential, but must only provide a "basic floor of opportunity" which will allow the child to progress with his education." *Brown v. Wilson County*, 16 EHLR 718, 721 (M.D. Tenn. 1990); see also *Clevenger, supra*. The proposed placement need not be the best one available, so long as it is appropriate. *Age v. Bullitt County Public Schools*, 673 F.2d 141, 143 (6th Cir. 1982).

The existence of T.C.A. §49-10-101 does not alter this mandate, since there is no legislative intent to expand state special education requirements beyond federally set standards. As *Brown* and *Clevenger* have held, in Tennessee there is no obligation to maximize a child's potential. All that is necessary is that a District meet the *Rowley* standard of providing a program "reasonably calculated to enable the child to

receive educational benefits". *Rowley*, supra.

The Tennessee statute does not indicate an intent by the Tennessee legislature to expand the federal standard since the Tennessee statute predates the federal scheme. The maximizing language of T.C.A. §49-10-101 was passed as Act of April 13,1972, ch. 839,1,1972 Tenn. Pub. Acts 1523, to take effect July 1, 1972. However, the federal act, P.L. 94-142, was enacted November 29, 1975, to take effect October 1, 1977. It is impossible to infer an intent to expand the federal scheme when the language in question predates the federal scheme.

Additionally, the maximizing language appears only in the preamble to the overall Tennessee special education law, and there only in the context of a policy consideration. Nowhere is there a statutory requirement that maximizing take place; rather, this is an inspirational statement. The School System is

not required to provide the child services greater than those established by federal law.

The child in this case is learning disabled with specific deficits in the area of written language expression; psychological assessments indicate that his intelligence is well above average, but that he is unable to take advantage of his intelligence level due to his handicap; he has difficulty coping with stress and needs to develop viable social skills; his ability to learn is affected by all of these factors.

An appropriate educational program for this child must include all of the following:

(1.) A comprehensive, fully integrated battery of assessment techniques should be undertaken to fill in any yet undetected gaps in the child's overall physical,emotional, psychological and intellectual profile. The team selected to coordinate these efforts should review

existing records to determine the nature and extent of necessary testing procedures; if the team determines that sufficient testing has already been done, this element of the program may be deemed complied with.

(2.) A qualified speech/language pathologist must design a program of diagnostic teaching or therapeutic intervention to address the child's specific handicapping condition. In designing this program, the recommendations contained in the August 18, 1990 Speech-Language Pathology Assessment Response are to be considered. If a properly qualified professional is not presently employed by the School System, the System must contract for this service.

(3.) Specific compensatory methods

for dealing with his handicap, as recommended by the neuropsychological report (April 21, 1990), must be implemented, including oral testing and dictation of assignments, use of a tape-recorder in place of note-taking, and use of a word-processing program (and the development of necessary basic skills). Tutorial services should be made available, as needed.

(4.) Psychological counselling by a qualified and experienced therapist must be provided to the child, both on a regular schedule and as emergencies arise. Development of social skills and stress-coping strategies must be emphasized as part of an overall plan to improve and maintain the child's mental health. If a properly qualified professional is not

presently employed by the School System, the System must contract for this service.

(5.) Vocational exploration prior to graduation.

(6.) The entire program must be coordinated and constantly revised and updated regularly by frequent contact and discussion between those responsible for the various components of the program, with one person directing and coordinating the overall effort.

The School System's proposed program may be inartfully drawn; however, when coupled with the three-page description of Program Services, it is found to contain all of the elements set forth above. The School System's program is appropriate.

B. Least Restrictive Environment

A handicapped child is to be educated with children who are not handicapped, to the maximum extent possible. 20 U.S.C. 1412(5) (B); 34 C.F.R. 300.550(1). A less restrictive environment is the appropriate placement for the child if the necessary services can be feasibly provided there, even if the more. restrictive setting might be considered superior. *Roncker ex rel. Roncker v. Walker*, 700 F.2d 1058 (6th Cir.), *cert. den.* 464 U.S. 864, 104 S. Ct 196, 78 L.Ed.2d 171 (1983).

The parents' proposed placement is a highly restrictive environment; all students are learning-disabled, handicapped children, totally eliminating the opportunity for educational interaction with non-handicapped students.

The School System's proposed placement on the other hand, offers the child an appropriate program in a setting which is essentially a modified mainstream educational setting, allowing maximum contact with non-eligible (non-handicapped) students. The System's proposal to mainstream the child in a regular high school setting with certain modifications and interventions satisfies the legal requirement of a free and appropriate public education in the least restrictive environment.

C. Reimbursement for Expenses Incurred by the Child's Parents Due to Their Unilateral Placement

20 U.S.C.A. Section 1415(e)(3) provides that during the pendency of any review proceedings, unless otherwise agreed by the parties, "the child shall remain in the then

current educational placement of such child." By unilaterally removing the child from the system and placing him in a residential facility, the parents violated this provision. While such a violation does not waive the parents' right to seek reimbursement for expenses incurred in the unilateral placement, an order for reimbursement is contingent upon a finding that the System's proposed IEP was inappropriate. *Burlington School Committee vs. Department of Education of Massachusetts*, 471 U.S. 359,10 S.Ct. 1996 (1985). Having previously determined that the School System's proposed IEP was not inappropriate, reimbursement will not be ordered for the expenses incurred by the child's parents due to their unilateral placement.

VI. Decision

IT IS HEREBY ORDERED that the School System shall make available a program containing all the components outlined in this Order and in the System's proposed IEP. If the parents wish to enroll their son in this program, they shall notify the System in writing within ten (10) days after the entry of this Order. Upon receipt of the parents' notification, the System shall have forty-five (45) days in which to complete the arrangements for implementation of the program.

The School System is declared to be the prevailing party in this case.

This decision is binding upon all parties unless appealed. Any party aggrieved by the findings and decision may appeal to the Davidson County Chancery Court of the State of Tennessee, or may seek review in the United

States District Court. Such an appeal must be taken within sixty (60) days of the entry of the Final Order in non-reimbursement cases and within three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases the reviewing court may direct that this Final Order be stayed.

/s/ Randall La Feavor
RANDALL LA FEAVOR
Administrative Law Judge

[Entered 11/9/90]

cc: Tricia Dennis
John Kitch
Frank Van Cleave

APPENDIX F

THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

20 U.S.C. Chapter 33

SUBCHAPTER I--GENERAL PROVISIONS

Sec. 1400.

Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings The Congress finds that--

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school

system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children

with disabilities in order to assure equal protection of the law. (c) Purpose It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities. (Pub L. 91-230, title VI, Sec 601, Apr. 13, 1970, 84 Stat. 175; Pub. L. 94-142, Sec. 3(a), Nov 29, 1975, 89 Stat. 774, Pub. L. 101-476, title IX, Sec. 901(a)(1), (b)(1)-(9), Oct. 30, 1990, 104 Stat. 1141, 1142; Pub. L. 102-119, Sec. 25(b), Oct. 7,1991, 105 Stat. 607.)

Sec. 1401.

Definitions

(a) As used in this chapter --

(1)(A) The term "children with disabilities" means children--

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services.

(B) The term "children with disabilities" for children aged 3 to 5, inclusive, may, at a State's discretion, include children--

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures,

in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) who, by reason thereof, need special education and related services.

(2) Repealed. Pub. L. 98-199, Sec. 2(2), Dec. 2, 1983, 97 Stat. I 357.

(3) Repealed. Pub. L. 100-630, title I, Sec. 101(a)(2), Nov. 7, 1988, 102 Stat. 3289.

(4) The term "construction", except where otherwise specified, means

(A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or

(B) acquisition of existing structures not owned by any agency or institution making application for

assistance under this chapter; or

(C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or

(D) acquisition of land in connection with activities in clauses (A), (B), and (C); or

(E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other

related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, Commonwealth of the Northern Marina Islands, or Palau (until the Compact of Free Association with Palau takes effect pursuant to section 101(a) of Public Law 99-658).

(7) The term "State educational agency" means the State board of education or other agency or officer primary responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public

authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law. except

that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which--

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific,

or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: Provided, however, That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semi professional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering,

scientific, or mathematical principles or knowledge, if the Secretary determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, the Secretary shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Secretary shall publish a list of nationally recognized accrediting agencies or associations which the Secretary determines to be reliable authority as to the quality of education or training offered.

The term includes community colleges receiving funding from the Secretary of the Interior under the Tribally Controlled Community College

Assistance Act of 1978 [25 U.S.C. 1801 et seq.].

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inures, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of children with disabilities, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public

education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "transition services" means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education,

vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique

needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include--

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the

school setting, So in original. Probably should be "responsibilities".

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alterative strategies to meet the transition objectives.

(21) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed her deducting--

(A) amounts received--

(i) under this subchapter,

(ii) under chapter I of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.], or

(iii) under title VII of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 3281 et seq.], and

(B) any State or local funds expended for programs that would qualify for assistance under such subchapter, chapter, or title.

(22) The term "native language" has the meaning given that term by section 7003(a)(2) of the Bilingual Education Act. See Reference in Text note below.

(23) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general

supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to children with disabilities within that State.

(24)(A) The term "public or private nonprofit agency or organization" includes an Indian tribe and the Bureau of Indian Affairs of the Department of the Interior (when acting on behalf of schools operated by the Bureau for children and students on Indian reservations) and tribally controlled schools funded by the Department of the Interior.

(B) The terms "Indian", "American Indian", and" Indian American" mean an individual who is a member of an Indian tribe.

(C) The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in

or established under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]).

(25) The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.

(26) The term "assistive technology service" means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes--

(A) the evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment;

(B) purchasing, leasing, or otherwise providing

for the acquisition of assistive technology devices by individuals with disabilities;

(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;

(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(E) training or technical assistance for an individual with disabilities, or, where appropriate, the family of an individual with disabilities; and training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities.

(27) The term "under represented" means

populations such as minorities, the poor, the limited English proficient, and individuals with disabilities.

(b) "Youth with a disability" defined

For purposes of subchapter 111 of this chapter, "youth with a disability" means any child with a disability (as defined in subsection (a)(l) of this section) who--

(1) is twelve years of age or older; or

(2) is enrolled in the seventh or higher grade in school.

(Pub. L. 91-230, title VI, Sec. 602, Apr. 13, 1970, 84 Stat. 175: Pub 1,. 94-142, Sec. 4(a) Nov. 29, 1975, 89 Stat. 775; Pub. L. 98-199, Secs. 2. 3(b), Dec. 2, 1983, 97 Stat. 1357, 1358, Pub L. 99-457, title IV. Sec 402, Oct. 8, 1986,100 Stat 1172; Pub. L. 100630, title 1, Sec. 101(a), Nov. 7, 1988, 102 Stat. 3289; Pub. L. 101-476, title 1, Sec 101, title IX, Sec. 901(b)(10)-(20), Oct 30, 1990, 104 Stat. 1103, 1142: Pub L. 102-73, title VIII, Sec. 802(d)(1), July 25,

1991, 105 Stat 361: Pub L. 102-119, Secs. 3, 25(a)(1), (2), (b), Oct. 7, 1991, 105 Stat. 587.)

Sec. 1412.

Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a Slate shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure

that:

(A) there is established

(i) a goal of providing full educational opportunity to all children with disabilities,

(ii) a detailed timetable for accomplishing such a goal, and

(iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements

would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date

of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all children with disabilities, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to children with disabilities who are not receiving an education, and second with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each child with a disability, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established

(A) procedural safeguards as required by section 1415 of this title,

(B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactory, and tions; amount of such payment for any fiscal year shall be I percent of the aggregate amounts available for all States under this section for that fiscal year.

(C) procedures to assure that testing and

evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criteria for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency

and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided children with disabilities in the State.

(7) The State shall assure that

(A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities, and

(B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and

section 1413 of this title.

(Pub. L. 91-230, title Vl, Sec. 612, Apr. 13,1970, 84 Stat. 178; Pub. L. 92-318, title IV, Sec. 421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub. L. 93-380, title Vl, Secs. 614(b), 615(a), title Vl, Sec. 843(b), Aug. 21, 1974, 88 Stat. 581, 582, 611; Pub. L. 94142, Secs. 2(a)(4), (c), (d), S(a), Nov. 29, 1975, 89 Stat. 773, 774, 780; Pub. L. 98-199, Sec. 3(b), Dec. 2,1983, 97 Stat. 1358; Pub. L. 99457, title 11, Sec. 203(a), Oct. 8, 1986, 100 Sht. 1158; Pub. L. 10~630, title 1, Sec. I0l(b), Nov. 7, 1988, 102 Stat. 3291; Pub. L. 101-476, title IX, Sec. 901(b)(33)-(46), (c), Oct. 30, 1990, 104 Stat. 1143-44, 1151; P b. L. 102-119, Sec. 25(a)(5), (b), Oct. 7, 1991, 105 Stat. 606, 607.)

Section 1413

State Plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall--

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including subpart 2 of part D of chapter I of title 1 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2791 et seq.], under which there is specific authority for the provision of assistance for the education of children with disabilities, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all children with disabilities, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) describe, consistent with the purposes of this chapter and nel development described in section 1476(b)(8) of this title, a comprehensive system of personnel development that shall include --

(A) a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified special education and related services personnel, including--

(i) the development and maintenance of a system for determining, on an annual basis --

(I) the number and type of personnel, including leadership personnel, that are employed in the provision of special education and related services, by area of specialization, including the number of such personnel who are employed on an emergency, provisional, or other basis, who do not hold appropriate State certification or licensure; and

(II) the number and type of personnel, including leadership personnel, needed, and a projection of the numbers of such personnel that will be needed in five years, based on projections of individuals to be served, retirement and other leaving of personnel from the field, and other relevant factors;

(ii) the development and maintenance of a system for determining, on an annual basis, the institutions of higher education within the State that are preparing special education and related services personnel, including leadership personnel, by area of specialization, including --

(I) the numbers of students enrolled in such programs, and

(II) the number who graduated with certification or licensure, or with credentials to qualify for certification or licensure, during the past year; and

(iii) the development, updating, and implementation of a plan that--

(I) will address current and projected special education and related services personnel needs, including the need for leadership personnel; and

(II) coordinates and facilitates efforts among State and local educational agencies, institutions of higher education, and professional associations to

recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel with disabilities; and

(B) a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this subchapter are approximately and adequately prepared, including--

(i) a system for the continuing education of regular and special education and related services personnel;

(ii) procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge denied from education research and other sources; and

(iii) procedures for adopting, where appropriate, promising practices, materials, and technology.

(4) set forth policies and procedures to assure--

(A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that--

(i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring provision of

special education and related services to all children with disabilities within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 141 I(a) or 141 I(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided

in this subchapter, and that a public agency will administer such funds and property;

(7) provide for --

(A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this subchapter, and

(B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educating agency or intermediate educational unit involved reasonable

notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter--

(A) will not be commingled with State funds, and

(B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive in pan the requirement of this subparagraph if he concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to a.ssure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of children with disabilities (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other

official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of children with disabilities. including individuals with disabilities, teachers, parents or guardians of children with disabilities, State and local education officials, and administrators of programs for children with disabilities, which --

(A) advises the State educational agency of unmet needs within the State in the education of children with disabilities,

(B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of children with disabilities and the procedures for distribution of funds under this subchapter, and

(C) assists the State in developing and reporting such data and evaluations as may assist the Secretary in the performance of his responsibilities under section 1418 of this title;

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to--

(A) define the financial responsibility of each agency for providing children and youth with disabilities with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement;

(14) set forth policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this subchapter are appropriately and adequately prepared and trained, including--

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing special education or related services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State; and

(15) set forth policies and procedures relating to the smooth transition for those individuals participating in the early intervention program assisted under part H who will participate in preschool programs assisted under this part, including a method of ensuring that when a child

turns age three an individualized education program, or, if consistent with sections 614(a)(5) and 677(d), an individualized family service plan, has been developed and is being implemented by such child's third birthday.

(b) Additional assurances

Whenever a State educational agency provides free appropriate public education for children with disabilities, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

(c) Notice and hearing prior to disapproval of plan (I) The Secretary shall approve any State plan and any modification thereof which --

(A) is submitted by a State eligible in accordance with section 1412 of this title: and

(B) meets the requirements of subsection (a) and subsection (b) of this section.

(2) The Secretary shall disapprove any State plan which does not meet the requirements of paragraph (I), but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

(d) Participation of children with disabilities in private schools; payment of Federal amount; determinations of Secretary: notice and hearing; judicial review: jurisdiction of court of appeals, petition, record, conclusiveness of findings, remand, review by Supreme Court

(1) If, on December 2, 1983, a State educational

agency is prohibited by law from providing for the participation in special programs of children with disabilities enrolled in private elementary and secondary schools as required by subsection (a)(4) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4) of this section.

(2)(A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may exceed the Federal amount provided per child under this subchapter to all children with disabilities enrolled in the State for services for the fiscal year preceding the fiscal year for which the determination is made.

(B) Pending final resolution of any

investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(4) of this section.

(3)(A) The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) If a State educational agency is dissatisfied with the Secretary's final action after proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in Section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under

subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set aside, in whole or in part. The judgement of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(e) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free and appropriate public education for children with disabilities within the State.

(Pub. L. 91-230, title VI, Sec. 613, Apr. 13, 1970, 84 Stat. 179; Pub. L. 93-380, title VI, Secs. 614(c),(d),615(b),(c),title VIII, Sec.843 (b)(2),Aug. 21, 1974, 88 Stat. 581, 583, 611; Pub. L. 94-142,

Sec. 5(a), Nov. 29, 1975, 89 Stat 782; Pub. L. 98-199, Secs. 3(b),7, Dec. 2, 1983, 97 Stat. 1358, 1359; Pub. L. 99-487, title II, Sec. 203(b), title IV, Sec. 1988, 102 Stat 3291; Pub. L. 101-476,title II, Sec. 202, title 202, title IX, Sec. 901(b)(47)- (58),Oct. 30, 1990, 104 Stat. 1111, 1114; Pub. L. 102-119, Secs. 5,25(a),(b), Oct. 7, 1991, 105 Stat 591,606,607.)

Sec. 1414.

Applications

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall--

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which--

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located, and evaluated, and

provide for the inclusion of a practical method of determining which children arc currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all children with disabilities, including--

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all children with disabilities, first with respect to children with disabilities who are not receiving an education. and second with respect to

children with disabilities, within each disability, with the most severe disabilities who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that--

(A) the control of funds provided under this

subchapter, and title to property denied from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter--

(i) shall be used to pay only the excess costs directly attributable to the education of children with disabilities, and

(ii) shall be used to supplement and, to the extent practicable, increase the level of State in local funds expended for the education of children with disabilities, and in no case to supplant such State and local funds, and

(C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least

comparable to services being provided in areas of such jurisdiction which are not receiving funds under this subchapter;

(3) provide for--

(A) furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of children with disabilities participating in programs carried out under this subchapter; and

(B) keeping such records, and affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subparagraph (A); and

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each child with a disability (or, if consistent with State policy and at the discretion of the local educational agency or intermediate educational unit, and with the concurrence of the parents or guardian, an individualized family service plan described in section 1477(d) for each child with a disability aged 3 to 5, inclusive) at the beginning of each school year and will then review and, if appropriate, revise its provisions periodically, but

not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

(b) Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Secretary under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a

hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall--

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of

section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

(c) Consolidated applications

(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application

submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of children with disabilities.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411 (d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall

prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

(D) Special education and related services provided directly be State educational agencies; regional or State centers.

Whenever a State educational agency determines that a local educational agency--

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of such children; the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to children with disabilities residing in the area served by such local

educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

(E) Reallocation of funds

Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all children with disabilities residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 141 I(d) of this title, to such other local educational agencies within the State as are not adequately

providing special education and related services to all children with disabilities residing in the areas served by such other local educational agencies.

(F) Programs using State or local funds

Notwithstanding the provisions of subsection (a)(B)(ii) of this Section, any local educational agency which is required to carry out any program for the education of children with disabilities pursuant to a state law shall be entitled to receive payments under Section 1411(d) of this title for use in carrying out such program, except that such payments may be used to reduce the level of expenditures for such program made by such local educational agency from state of local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

(Pub. L. 91-230, title VI, Sec 614, Apr. 13, 1970, 84 Stat. 181; Pub. L.94-142, Sec. 5(a), Nov. 29,

1975, 89 Stat. 784; Pub. L. 98-199,Sec. 3(b), Dec. 2, 1983, 97 Stat. 1358; Pub. L. 100-630, title I, Sec. 102(a), Nov. 7, 1988, 102 Stat. 3293; Pub. L. 101-476, titleIX, Sec. 901 (b)(59)-(70), Oct 30, 1990, 104 Stat. 1144; Pub. L. 102-119, Secs. 6, 25(b), Oct. 7, 1991, 105 Stat. 591, 607.)

Sec. 1415.

Procedural safeguards

(a) establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(I) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification,

evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit--

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph

shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be

accorded--

(I) the night to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the night to a written or electronic verbatim record of
such hearing, and

(4) the night to written findings of fact and decisions (which findings and decisions shall be made available to the public) consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1414(a)(12) of this title.

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection .

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in

controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if--

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at

any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer orders that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that--

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar

services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to resend or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 [U.S.C. 790 et seq.], or other Federal statutes protecting the rights of

children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (h)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(Pub L, 91-230, title VI, Sec 615, as added Pub L. 91-112, Sec 5(a), Nov 29, 1975, Stat 7 and amended Pub. L. 99 372, Sec 2. 3, Aug. 5, 1986, 101 Stat. 796, 797; Pub L. 100-630, title 1, sec 102(c), Nov 7, I988. 102 Stat 3294, Pub. L. 101-476, title IX, Sec 901(b)(71)-(75), Oct 30, 199(), 104 Stat 1145. Pub L 102-119. Sec. 25(h), Oct 7, 1991, 105 Stat 607)

APPENDIX G

PART 1

GENERAL PROVISIONS

TENNESSEE CODE ANNOTATED

49-10-101.

Legislative intent--

Application of parts 1-6.- (a)(1) It is the policy of this state to provide, and to require school districts to provide, as an integral part of free public education, special education services sufficient to meet the needs and maximize the capabilities of handicapped children.

(2) The timely implementation of this policy to the end that all handicapped children actually receive the special education services necessary to their proper development is declared to be an integral part of the policy of this state.

(b) This section applies to all handicapped children regardless of the schools, institutions or programs by which such children are served.

(c) The state board of education shall adopt rules and regulations, which it may modify from time to time, to implement the policy established in parts 1-6 of this chapter. [Acts 1972, ch. 839, 1; 1978, ch. 574, 1; T.C.A., 49-2912.]

TENNESSEE CODE ANNOTATED

49-10-102. Definitions [Amendment effective July 1,1991]. --

(1) As used in parts 1-6 of this chapter: (1) "Handicapped child" means handicapped children and youth between the ages of four (4) and twenty-one (21) years, inclusive, who have been certified under regulations of the state board of education by a specialist as being unsuited for enrollment in regular classes of the public schools or who are unable to be educated or trained adequately in such regular programs without the provision of special classes, instruction, facilities or related services, or a combination thereof. Any handicapped child who turns twenty-two (22) between the commencement of the school year in August and the conclusion of the school year the following June, will continue to be a "handicapped child" for the remainder of that school year;

(a) "Handicapped child" includes the educable, trainable and profoundly retarded; the speech and or language impaired; the deaf and hearing impaired; the blind and visually limited; the physically handicapped and/or other health impairments including homebound and hospitalized; the learning disabled including perceptually handicapped and emotionally conflicted; the multiple handicapped; the intellectually gifted; and any other child whose needs and abilities cannot be served in a regular classroom setting;

(b) "Handicapped child" includes all children down to and including the age of three (3) years who are deaf;

(2) "School district" means either a school district or a political subdivision operating a public school or public school system;

(3) "Special education facility" means a school or any portion thereof, remedial or supplemental facility or any other building or structure or part thereof intended for use in meeting the educational, corrective and related needs of handicapped children; and

(4) "Special education services" means classroom, home, hospital, institutional and administrative services needed to meet the needs of handicapped children; transportation of such handicapped children who are unable to u~e public transportation; corrective and supporting services including diagnostic and evaluation services, social services, physical and occupational therapy, job placement, orientation and mobility training, braillist, typists and readers for the blind, specified materials and equipment and other such services as approved by the division for the education of the handicapped and authorized by the state board of

education; and other services that may be approved by the state board of education to assist handicapped children in taking advantage of or responding to educational programs and opportunities. [Facts 1972, ch. 839, 3;1978, ch. 573, 1;1981, ch. 151, 1;1981, ch. 281, 1; T.C.A., 49-2914; Acts 1988, ch. 677, 1; 1989, ch. 421, 1.]

49-10-103. Special services to be provided - Avoidance of separate schooling. - (a) The state board of education shall provide or cause to be provided by school districts all regular and special education, corrective and supporting services required by handicapped children to the end that they shall receive benefits

(b)(1) It is within the jurisdication of the commissioner of education to origanize and to supervise schools and classes according to the regulations and standards established for the conduct of schools and classes of the public school system in the state in all institutions wholly or partly supported by the state which are not supervised by public school authorities.

(2) Schools and classes so established in wholly state-owned institutions shall be financed by the

department of education.

(c)(1) To the maximum extent practicable, handicapped children shall be educated along with children who do not have handicaps and shall attend regular classes.

(2) Impediments to learning and to the normal functioning of handicapped children in the regular school environment shall be overcome by the provision of special aids and services rather than by separate schooling for the handicapped.

(d)(1) As an exception to the provisions of subdivision (c)(2), children who are legally blind, acting through their parents or guardians, shall have free choice between education in regular classes alongside children without visual handicaps and education at the Tennessee School for the Blind.

(2) The Tennessee School for the Blind shall

continue to be staffed and equipped to provide educational services comparable to those of regular school programs leading to a high school diploma.

(3) In order that legally blind children might be able to make a knowledgeable free choice, the parents or guardians of the children shall be counseled with concerning available special education programs for such children. The person counseling with such parents and guardians concerning available programs shall reduce to writing a summary of the programs and obtain the signature of a parent or guardian of each such child on a copy of the writing acknowledging receipt of the writing, the absence of which writing shall create a conclusive presumption that any choice made was not free and knowledgeable.

(4) Any election made pursuant to this subsection shall relate only to each school year, and the right of free choice and election as provided herein shall pertain as to each school year.

(e) Subject to the exception provided by subsection

(d), special classes, separate schooling, or other removal of handicapped children from the regular educational environment shall occur only when, and to the extent that, the nature or severity of the handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily.

(f) Physical aspects and specifications of schools, classrooms and other facilities for, or likely to be used by, handicapped children, shall be related to their special physical, educational and psychological needs. To this end, school districts, special education services associations, agencies of the state and its subdivisions, and any private persons or entities constructing, renovating or repairing facilities with or aided by public funds,

which facilities are expressly intended for or are likely to be used by handicapped children, shall plan, locate, design, construct, equip and maintain them with due regard for the special capabilities, handicaps and requirements of the handicapped children to be accommodated therein.

(g)(1) It is the responsibility of local governments and school districts to expend effort on behalf of the education of each handicapped child equal to the effort expended on account of the education of each child who does not have a handicap.

(2) Any additional effort necessary to provide supplemental aids and services shall be the ultimate responsibility of the state but shall, to the maximum extent practicable, be administered through the local school district.

(h)(1) The responsibility of local governments,

school districts and the state to provide a free public education for handicapped children is not diminished by the availability of private schools and services.

(2) Whenever such schools and services are utilized, it continues to be the public responsibility to assure an appropriate quantity and quality of instructional and related services, and the protection of all other rights, and to ascertain that all handicapped children receive the educational and related services and righls ta which the laws of this state entitle them. [Acts 1972, ch. 839, § 2; 1975, ch. 147, § 1; T.C.A., § 49-2913.]

49-10-104. Division for the education of the handicapped.

(a) There is hereby established in the department of education a division for the education of the handicapped.

(b) The division shall be headed by an assistant commissioner who shall be qualified by education, training and experience to take responsibility for, and give direction to, the programs of the department of education relating to the handicapped.

(c) This division shall have the duties and responsibilities formerly the function of the area of special education of the department of education as well as those duties and responsibilities described

in parts 1-6 of this chapter.

(d)(1) The assistant commissioner who shall head the division shall be appointed by the commissioner of education in accordance with rules, regulations and directives currently in effect.

(2) Recommendations of individuals deemed qualified for this position may be made by the advisory council for the education of the handicapped hereinafter described in 49-10-105. [Facts 1972, ch. 839, 4; T.C.A., 49-2915.]

APPENDIX H

Massacheusetts Education Laws Annoated

Volume 8B

Chapter 69 to 71B

2. Regulations; special education programs; pre-school level admission to programs; assignment of child

The department shall promulgate, in cooperation with the departments of mental health, mental retardation, public health and social services, regulations regarding programs for children with special needs, including but not limited to a definition of special needs; provided, however, that such definition shall emphasize a thorough narrative description of each child's developmental potential so as to minimize the possibility of stigmatization and to assure the maximum possible development in the least

restrictive environment of a child with special needs; and provided, further, that such definition shall be sufficiently flexible to include children with multiple special needs. Prior to referral of a school age child for evaluation under the provisions of this chapter, the principal of the child's school shall ensure that all efforts have been made to meet such child's needs within the regular education program. Such efforts may include, but are not limited to: modifying the regular education program, the curriculum, teaching strategies, environments or materials; the use of support services; the use of consultative services and building based teams to meet the child's needs in the regular education classroom. Such efforts and their results shall be documented and placed in the child's school record provided, that such efforts shall not be construed to limit or condition the right to refer a school age child for an evaluation under the provisions of this chapter. Children receiving or requiring special

education shall be entitled to participate in any of the following programs: (1) additional direct or indirect instruction consultation service, materials equipment or aid provided children or their regular classroom teachers which directly benefits children requiring special education; (2) supplementary individual or small group instruction or treatment in conjunction with a regular classroom program; (3) integrated programs in which children are assigned to special resource classrooms but attend regular classes to the extent that they are able to function therein; (4) full-time special class teaching or treatment in a public school building; (5) teaching or treatment at home; (6) full-time teaching or treatment in a special day school or other day facility; (7) teaching or treatment at a hospital; (8) teaching or treatment at a short or long term residential school; (9) occupational or pre-occupational training in conjunction with the regular occupational training program in a public

school; (10) occupational and preoccupational training in conjunction with full-time special class teaching in a public school building, at home, special day school or other day facility, hospital, or short or long-term residential school; (11) any combination or modification of programs (1) through (10) or other programs, services, treatments or experimental provisions which obtain the prior approval of the department.

Admission to such programs on the pre-school level at an earlier age than at which schooling is ordinarily provided shall be regulated by the department in conjunction with the departments of public health, mental health and mental retardation and shall be restricted to children with substantial disabilities who are judged by said departments to require such programming.

No child shall be assigned to a special education class unless it is first determined by an evaluation of the child's needs and the particular

special education program that the child is likely to benefit from such program- periodically thereafter, and in no event less often than annually the child and his program shall be reevaluated to determine whether said child is benefiting from said program in accordance with the procedures set forth in section three. In the event that said program is not benefiting the child and that another program may benefit the child more, or said program has benefited the child sufficiently to perrnit reassignment, the child shall be reassigned, and in the event of consistent failure of a program to benefit children there assigned, the program shall be abolished or altered. Amended by St 1986, c. 599, 20, 21; St.1989, c. 653, 50; St.1991, c. 138, 138.

3. Identification of school age children with special needs; diagnosis of needs; proposal of program; consent; evaluations and assessments of child and program

In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health, mental retardation, and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs,or a school age child requiring special education.

No school committee shall refuse a school age

child with special needs admission to or continued attendance in public school without the prior written approval of the department, and without complying with the department's regulations and procedures for disciplining students with special needs, where applicable. During the pendency of administrative or judicial proceedings, a court of competent jurisdiction shall have the authority to change a child's educational placement, including removing the child from. school, in any circumstances when the school committee shows that the child's behavior poses a substantial likelihood of injury to himself or others; provided, however, that the foregoing shall not be construed to abrogate any authority concerning discipline for such a child which is available to a school committee under said regulations and procedures or any other law. No child who is so refused or removed shall be denied an alternative form of education approved by the department, a5 provided

for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency, or through any other program which is approved for the child by the department.

Within five days after the refeml of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health, mental retardation, and public health and the right to appeal from any evaluation, first to the

department, and then to the courts.

The department jointly with the departments of mental health, mental retardation, and public health shall issue regulations to specify qualifications for persons assessing said child.

If a child with special needs requires a medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available, in accordance with regulations promulgated jointly by the departments of education, mental health, mental retardation, public health and social services in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health, mental retardation, and public health or, at private expense, from any specialists.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education program. The hearing officer shall order such educational placement and services as he deems appropriate and consistent with this chapter to assure the child's maximum possible development in the least restrictive environment; provided, however, that a presumption shall exist to direct such placement to

the regular educational environment. Such order may provide for. the placement or services requested by the school committee, the placement or services requested by the parent, either of those placements or services with modifications, or such alternative programs or services as may be required to assure such development of such child. Said parents, guardians or persons with custody may either consent to or reject such placement, program or services. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parent, guardian or persons with custody except where such placement would seriously endanger the health or safety of the child, substantially disrupt the program for other students or, if the child is currently placed in a special education program, deny the child a free

appropriate public education. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program. If the parents, guardians or persons with custody reject the educational placement recommended by the department and desire a program other than a regular education.

APPENDIX I

Michigan Complied Laws

Sections 340.1 to 389.End

380.1701 Duties of state board

Sec. 1701.

The state board shall:

(a) Develop, establish, and continually evaluate and modify in cooperation with intermediate school boards, a state plan for special education which shall provide for the delivery of special education programs and services designed to develop the maximum potential of every handicapped person. The plan shall coordinate all special education programs and services.

(b) Require each intermediate school board to submit a plan pursuant to section 1711, in

accordance with the state plan, to be approved by the state board.

(c) Promulgate rules setting forth the requirements of the plans and procedures for submitting them.Section 380.1711.

APPENDIX J

Seth KRICHINSKY, by and through
his parents and next friends,
Mr. and Mrs. Alan KRICHINSKY,

v.

KNOX COUNTY SCHOOLS,
and Earl HOFFMEISTER, Superintendent, Knox County Schools,

v.

Seth KRICHINSKY, etc.,

No. CIV-3-90-823

U.S. District Court,
Eastern District of Tennessee, Northern Division

March 2, 1991

The parents of a 12-year-old student with multiple disabilities sought residential placement

for their son after he began to exhibit increased violent behavior at home. Following a due process hearing, an administrative law judge (ALJ) concluded that the student functioned adequately in his public school placement and did not require residential treatment. The ALJ ordered the district, however, to provide the student with increased occupational therapy (OT) and speech services. The parents appealed, maintaining that a residential facility would be the optimal placement for the student; in addition, the district cross appealed, arguing that the increased OT and speech services were not warranted under the threshold standard of the EHA (now the IDEA).

HELD: for the parents, in part.

The court concurred with the ALJ that the state law, which required special education services to "maximize the capabilities of handicapped

children," incorporated a higher standard than the threshold standard of the EHA. Thus, the additional OT and speech services were determined to be necessary to provide an appropriate educational program to the student. The court also upheld the ALJ's finding that the student did not require, and would not benefit from, any of the available residential placement alternatives. Despite affirming the core of the administrative findings, the court declined, however, to order the specific relief granted by the ALJ, insisting instead that the parties make additional efforts lo develop and implement an appropriate IEP in accordance with its opinion.

HULL, District Judge

Order

These are cross-appeals from an administrative ruling under the Individuals with Disabilities

Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, formerly the Education of the Handicapped Act. They came before the Court for a hearing on Friday, February 15,1991.

After a consideration of the evidence offered al the hearing, and a complete review of the administrative record, the Court makes the findings of fact and conclusions of law which follow.

Seth Krichinsky is a 12-year old boy with multiple handicapping conditions which are the result of neurological impairments. These conditions include mild lo moderate mental retardation, fine motor problems which require occupational therapy, articulation and language deficits which require speech therapy, and a behavior disorder which involves extremely impulsive and ritualistic behavior. Seth has also been diagnosed as suffering from an attention deficit and hyperactivity disorder. He has been in special education classes in the public schools since age 4.

There is no question that Seth exhibits his best behavior in highly structured, controlled and predictable environments. He has done remarkably well in Knox County's Comprehensive Development Classes, and is not considered violent or a behavior problem at his school. ll is also undisputed that Seth's ability to control his impulsive behavior breaks down in the less structured home environment. As he matures, physically, he is becoming more difficult for his parents lo manage. He requires constant, one-on-one supervision in his home and community. The Krichinskys fear that his "acting out" (aggressive behavior) will hurt their younger child, Micah, and

The Krinchinskys are hard-pressed but sensitive, sophisticated people. They have taken the trouble to receive training in behavior management from Dr. Robert Wahler, a PHD Clinical Psychologist who has been working with the whole family in their home selling. Both Dr.

Wahler and Dr. Edward Workman, a (Consulting Psychiatric Physician, who examined Seth as a consultant for the school system, have advised the Krichinskys that Seth would benefit from a residential placement in a rehabilitation center where there was complete round-the-clock control over his behavior. Both because of their decreasing ability to cope with Seth at home and because their experts were suggesting a residential placement, the Krichinskys refused to accept the Individualized Educational Program (IEP) formulated by Seth "M-Team" in May of 1990, and initiated the administrative appeal giving rise to this lawsuit.

The Administrative Law Judge (ALJ), James A. Milroy, II, reports that the hearing addressed the following issues:

1. Whether a residential placement was appropriate for Seth and whether or not the expense of such a placement should be borne by

the public schools;

2. Whether adequate speech and language instruction is being offered Seth by the public schools; and

3. Whether adequate occupational therapy is being offered Seth by the public schools.

After two days of testimony, the ALJ concluded that Seth did not require a residential placement because he was functioning fairly well in the school environment, because the school had yet to attempt a professionally designed behavior modification program in his home to solve the problems there, and because the placements the parents proposed were all hundreds of miles away and would impede his gradual integration into his home community. However, with regard lo the second and third issues, the ALJ found that Seth should have more speech and occupational therapy than was currently being offered by the school systems. The

ALJ ordered Knox County to,

1) Continue Seth in his special Comprehensive Development Classroom.

2) Hire a Master's Level or above psychologist with three or more years of experience in behavior management to be assigned to Seth's case, lo identify reasonable al-home objectives for his behavior modification, to design a behavioral program tailored to meet his needs, to observe him in his home and implement the program, and to provide a coach (not necessary to the psychologist) to work with the family for at least two hours a week, throughout the 1990-1991 academic year to implement the program.

3) To offer Seth an extended day program, lasting at least until 5:30 in the evening and preferably through the supper hour in order to work on his eating habits and table manners, etc.

4) To offer Seth 90 minutes of speech therapy weekly, with at least 45 minutes or this

therapy to be in an individual therapy selling.

5) To offer Seth 90 minutes of occupational therapy weekly, sixty of which could bc delivered by "indirect therapy."

While that Krichinsky would welcome the additional speech and occupational therapy, the extended day program, and the home intervention, they appealed from his ruling because they believe that the optimal educational placement for Seth would be in a residential rehabilitation center. Knox County cross-appealed, contending that the ruling was highly burdensome and offered unnecessary relief. For example, it denies that Seth requires intensive language training. Knox County does not currently offer any extended day programs which run through the dinner hour and it complains that implementing the ALJ's order would cost the county an additional $720/month for Seth. Knox County would have this Court

rule that the IEP formulated by Seth's M-Team in May of 1990, fully meets the federal requirement to provide a "free appropriate education."

This Court finds itself in full agreement with the ALJ that Seth does not now require a residential placement but that additional speech and occupational therapy are warranted by the evidence. It notes that the ALJ correctly applied the higher standard mandated by the Tennessee legislature that Knox County's special education services "maximize the capabilities of handicapped children" rather than the lower, threshold level required by federal law and urged upon the Court by Knox County.

The ALJ's decision with regard to speech therapy is fully supported by the thorough diagnostic evaluation of Seth's language ability made by the Davidson School in Atlanta, a school

which specializes in language disorders and speech and hearing problems. The Court notes that this evaluation recommended "intense therapeutic intervention involving daily therapy, as well as group and classroom-integrated language programming."

The ALJ's findings with regard to occupational therapy are supported by the testimony of Dr. Edward Workman, Dr. Wahler and Susan Boll, who holds a Masters in Special Education.

The more difficult question, of course, is the one concerning a residential placement. All the experts agree that Seth requires a very intensive program focused on teaching the activities of daily living. They all seem to agree that Seth needs to start in a highly structured environment and gradually increase his capacity for independence. However, it is by no means clear that the ideal residential placement for Seth even exists. Dr. Wahler, for example, did nol know of a program that met his

ideal specifications for Seth. There is no dispute that it does not exist in East Tennessee. Many special schools apparently focus on the control of behavior but do not work on the gradual reintroduction to society. Dr. Workman conceded that the type of training Seth needs might be accomplished through the Knox County school system. The Court is convinced that this must be attempted before a more restrictive alternative is considered. It is simply unwilling to institutionalize a young man who seems to function well in a school setting.

The Court notes that the degree of control and structure offered in the school environment seems to be enough, at least at this stage in Seth's life, to allow him to conform his behavior to acceptable limits and to make modest academic progress. His teachers have not found him antisocial or unmanageable. An extended school day would provide more of this environment in which Seth

seems capable of socializing, learning and growing. The Court also recognizes that the appropriate educational focus for Seth must not be on academics but on skills that will help him function as a adult and perhaps be able to hold a job in a sheltered environment.

Several of the experts who testified on behalf of Knox County believe that Seth is ready to"graduate" from his current Comprehensive Development Class at West Hills Elementary School and move into a "Lest Restrictive Environment" (LRE) Program at Bearden Middle School. According to the testimony of Dr. Janice Yoder, this program emphasizes the transition from school to work in a sheltered environment, teaching skills that will lead to social independence. The program addresses social skills, domestic skills, and integration in the community. For example, each LRE program apparently has a van used to transport students into the community to practice

skills such as shopping for clothes in appropriate sizes. This type ot program appears well suited to meet Seth's long-term needs.

In summary, the Court AFFIRMS the ALJ's findings with regard to the need for additional speech and language training and additional occupational training. It also AFFIRMS his finding that a residential placement for Seth is not required at present and that Knox County should be able to fashion a program tailored to meet Seth's needs. However, the specific relict ordered by the ALJ will not bc adopted by this Court, at least not at this time.

For one thing, the ALJ ordered that Seth continue in his current CDC classroom, although there is considerable evidence in the record which suggests that he is ready to progress to the IRE program at Bearden Middle School. For another, the Court is under the impression that once the Krichinsky's decided to insist on a residential

placement for Seth, constructive negotiations between school authorities and the Krichinsky broke down. It is possible that, now that His Court has decided not to order residential placement for Seth, and now that it has affirmed the ALJ's findings that he requires additional language and occupational training, the parties will bc able to work out a plan for him which is better than anything either the ALJ or this Court could devise. Everything in the record testifies to the fact that all interested parties arc concerned with Seth's best interests and are anxious to meet his needs.

Accordingly, the Court will defer any final order of exactly what relief should be offered to Seth Krichinsky until his parents and his M-Team have had a chance to meet again a~ develop a new IEP for him. The parties are directed to consider the relief offered by the ALJ including the extended day program, the family intervention, and the additional speech and occupational therapy. The

new IEP should address what modifications in Seth's current program at West Hills could bc made immediately, what might bc offered to him over the summer, and what Would be appropriate for the 1991-92 academic school year.

Attorneys for both parties are ORDERED to report back to this Court in forty-five (45) days.

APPENDIX K

BEFORE THE TENNESSEE STATE
DEPARTMENT OF EDUCATION

IN THE MATTER OF:

_____* No. _____**

VS.

_____

ORDER

A hearing was held in the above matter in Morristown, Tennessee, on October 29, 1986, before John D. Kitch, Administrative Judge, assigned by the State Department of Education. _____, Special Education Supervisor for the _____ County School System, and

_____

* In the original, the names of the parties were blanked out to protect the child.

** Number omitted on original

_____, Superintendent of the _____ County School System, represented the School System. Mr. and Mrs. _____ the parents of _____ were present and were represented by Ms. Mary Juanita Presley.

After full hearing before the Administrative Judge, consideration of the record in this matter, arguments of the representatives of both parties, and the documents submitted on behalf of both parties, this tribunal makes the following findings and order:

1. The _____ County School System's proposed Individual Education Plan constituted an appropriate placement and an appropriate program for _____, if in fact she had been an Option 7 special needs child. This finding is predicated upon the School System providing the auditory trainer it conceded is necessary and

following through on the other proposals in the IEP. The IEP was developed upon the finding by the school system, based upon limited information, that _____ was an Option 7 needs child.

2. However, the proof at the hearing establishes that _____ is an Option 8 special needs child, and it is ordered that from this point forward _____ shall be treated as such for all purposes, including funding and the creation of an appropriate placement for her.

3. Because of this reclassification, the School System's IEP is not adequate as proposed, and it is ordered that the IEP shall be modified by requiring the School System to hire a full-time interpreter for _____ in order to create a total communication environment. This interpreter shall be fluent in sign, and part of his or her duties shall included the responsibility for teaching

signing to the non-fluent teachers and professionals with whom _____ will be in regular daily contact. It is recommended, but not required, that the interpreter have a background in education. It is further ordered that at all times _____ is in school, she shall be accompanied by a teacher, professional or interpreter fluent in signing. Once her teachers and other professionals reach a level of fluency such that the use of an interpreter is superfluous, there will be no requirement that the interpreter remain on staff. However, the requirement that a sign-fluent person be with her at all times shall remain in effect as she passes from grade to grade.

4. With these modifications, the proposed IEP is adequate in all respects and it is ordered that placement of _____ shall be in the _____ Learning Complex Special Education Center as the least restrictive

environment for the child, under the IEP as modified.

This decision is based upon the following Findings of Fact, Conclusions of Law and Reasons for the Decision:

I.

FINDINGS OF FACT

_____ is a four year old child who has been certified as deaf/profoundly hearing impaired. This certification is stipulated by the parties to be an accurate assessment of her condition. She is otherwise a normal, healthy child, except to the extent that her educational, social and emotional development had been hampered by her deafness. _____ lives with her parents in _____ County, Tennessee. At the time of this hearing _____ was enrolled in the Tennessee Infant Parents Program but her eligibility for continuing in that program was due to

end because of her reaching the age of four on November 2, 1986. The child had been learning to sign as a mean of communication through the TIPS program, as have the child's parents and sister. Other relatives can also sign. The child has hearing friends and relatives of roughly her age as playmates, who do not sign.

The School System has a certified deaf education teacher who is fluent in signing, has another teacher at the Special education Center who is close to being certified in deaf education, and is willing to hire someone proficient in communication skills to work with _____ when she is not with one of the teachers mentioned earlier. Further, the regular teacher in the Special Education classroom will have an aide. While none of the educators who will come in contact with _____ are fluent in sign language, with the exception of the certified deaf education teacher, all expressed a willingness to learn sign for

the benefit of the child and each expressed a confidence that she would be able to progress rapidly enough to provide total communication for _____ as they understood that concept.

The School System indicated a willingness to hire a total communication person who was not merely an interpreter, but someone with a background in education. However, there was concern that such a person could not be found immediately. The School System intends to purchase an auditory trainer, which it recognized is necessary for _____.

The _____ Learning Complex contains a Special Education Center, where the School System proposes to place _____ located in the same building with regular elementary and middle school classrooms. These classrooms are separated from the Special Education Center by nothing more than a door. All student share the same cafeteria facilities and

gymnasium with the other classes in the building. Special students participate in music classes and geography classes with non-handicapped students, as well as assembly programs and playground activities. The School System proposes that _____ go to the cafeteria to obtain her lunch every day, where she would come in contact with non- handicapped students, but return to the Special Education Center to eat lunch. Once _____ develops sufficiently to manage in a more integrated setting, she would eat lunch with non-handicapped students of comparable age.

The School System proposed to place _____ in Option 7 in the proposed IEP, which would be a Comprehensive Developmental Class. The parents of the child proposed to categorize the child as Option 8, a categorization with which the School System now agrees. The proposed IEP was prepared based upon information provided to the School System, since _____ never has been

enrolled in school in _____ County. The School System IEP considers several support programs and services for the child, including the purchase of an auditory trainer, consultation services, itinerant teacher services, resource services, physical therapy, occupational therapy, speech training, auditory training, physical education, and parent counseling services.

The qualifications and dedication of the teachers and other professionals who would be working with the child, wither at the _____ Learning Complex or at the Tennessee School for the Deaf, are of the highest order. The sole distinguishing attribute is the signing proficiency of the professionals at Tennessee School for the Deaf. Every person who testified before this tribunal has the child's best interests at hear, and differ merely in how best to meet her special needs.

II.

CONCLUSIONS OF LAW

The provisions of the Education for All Handicapped Children Act of 1975, 20 U.S.C. 1401 et seq., require that "...to the maximum extent possible" a handicapped child must be educated with children who are not handicapped. A child should be removed from a regular educational environment only when the handicapping condition is of such nature or severity that even with the use of supplementary aids and services "mainstreaming" is inappropriate. 20 U.S.C. 1412(5)(B). This Federal requirement of placing a handicapped child in the least restrictive environment is mirrored in the provisions of T.C.A. 49-10-103.

There is a very strong legislative preference for mainstreaming, even where some may consider a segregated institution academically superior for the

child. Where such a segregated facility exists, a tribunal must consider whether the services that institution can provide can be feasibly provided in a non-segregated setting. If so, then the preference for mainstreaming requires that the child's placement be in the non segregated setting. Roncker v. Walter, 700 F.2nd 1058 (6th Cir. 1983). It is also noteworthy that the concept of mainstreaming extends beyond the classroom to activities "such as lunch, gym, recess and transportation to and from school." Id, n.6, at 1063.

It is incumbent upon a local school system to develop an Individual Education Program (IEP) for a child who has been certified as handicapped. 34 C.F.R. 300 et seq.; State Department of Education Rules 0520-1-3-.09 et seq. In so doing, the school system will categorize the child in one of ten service options, with the higher options reflecting increasing needs of the child. The system will then propose an IEP designed to maximize the child's

educational and social potential. Upon proper petition by the parents, is the function of the Administrative Judge/Hearing Officer to review an pass on the propriety of the school system's placement and programming.

III.

REASONS FOR THE DECISION

Because of _____ tender age, her relatively limited vocabulary and the excellent work which has been done already through the TIPS program in enabling _____ and her parents to adjust to her handicap, an interpreter especially on with an educational background would enable all her teachers and related professionals to meet her immediate communications needs in the less restrictive environment of the _____ Learning Complex Special Education Center. As the interpreter enabled _____ to communicate

with all the teachers and other professionals with whom _____ would come in contact, these people would also be learning to sign. It is this tribunal's opinion that they would soon reach a level of signing proficiency such that they would be able to adequately to communicate with _____ in a total communication setting in a relatively short span of time. Once they had reached a level equivalent to _____ signing skills, they would have no difficulty in "staying ahead" of her, and could communicate as well with her as the professionals at the Tennessee School for the Deaf. In fact, this is precisely what _____ parents and sister have been doing, and the testimony is clear that _____ is flourishing in her home environment because of these efforts.

This decision comports with the requirements of state and federal law that "to maximum extent appropriate" _____ be educated with non-

handicapped peers, and it is the opinion of this tribunal that _____ handicap is no such that ____ should be further removed from the regular educational environment, other than to the extent proposed in the IEP as it has been modified by this tribunal Entered and effective this 24th day of November, 1986.

_____

ADMINISTRATIVE JUDGE/HEARING OFFICER

APPENDIX L

Public Chapter 839, 1972

Tape Transcript

House, Floor

April 4, 1972

House Bill 2053

Tapes H-188 and H-189

Clerk: House Bill, Mr. Speaker, we're ready for further condisderation on House Bill Number 2053, by Mr. Weldon, and act for the purpose of providing education for the handicapped.

Speaker: Gentlemen from Shelby County, Rep. Weldon.

Weldon: Mr. Speaker, Lady Doyle, and members of the House, this bill presently before you is

without a doubt is one of the finest bills that's ever been presented to the handicapped. That covers a very broad spectrum. It has to do with the blind, the lame the halt, the retarded, the amputee, those that are forn or those things that so happen at birth or after birth to a child. The intent and purpose of this bill is to set up a method whereby the State of Tennessee through its various school districts, and in cooperation with the state to provide a, an education for each child. Now, this is an education , a free education in the public school system from the largest school system to the smallest. Thsi bill is quite detailed. I don't know that very many of you have had the opportunity to thoroughtly research it, read it, consult with your people at home to find out just what and

how it will affect your individual school systems. It's a good bill. It's a model act. It's patterned on the model act that had already been passed in several states. I have information regarding this particular bill that if you do not act here in this body this year, and do it ino our own sweet time, to implement it in the various phases as are set out, to find the teachers, to run the census on the number of children who will be affected, to teah the teachers how to teach, to provide the aides, to get the service districts set up. The bill goes in to various steps. But if we do not act here, then I'm afraid the federal court's going to tell us we are going to have to do it and they'll ram it down our throats. Mr. Speaker, I move passage of House Bill 2053 on third and final reading.

Speaker: Mr. Weldon has moved passage of House Bill 2053 on third and final reading. That motion has been properly seconded. The gentlemen from Sullivan County, Rep. Bible.

Bible: Mr. Speaker, members of the 87th General Assemby, I rise to second the motion on this, passage of this bill. I think this is probably one of the best bills which Rep. TAg Weldon has come up with this year, and I definitely want to congratulate him on it. We've been considering before the body this year voting on the deaf school and help to build the deaf school, and on occasion we've had a bill concerning the blind. This bill does it the way it should be done. It does it within the local school system and takes care of all special children, handicapped and otherwise. So

I think this is a very good bill and I'd ask you all to vote for it.

Speaker: Gentleman from Williamson County, Rep. McWilliams

McWilliams: Sponser yield?

Weldon: Sponser yeilds.

McWilliams: Mr. Weldon, there is no fiscal note attached to the bill. Are there fiscal implications?

Weldon: Mr. McWilliams, there are fiscal implications. There is no fiscal note. I have not seen one. However, the cost of implementing the program as set out in the bill, I have no idea what it would cost.

McWilliams: Well, is it funded in the budget?

Weldon: No, it has not been funded in the budget.

McWilliams: Well, where's the money going to come from to implement it, Mr. Weldon?

Weldon: It could very well come from the individual school districts.

McWilliams: In other words, we're imposing this upon our local school systems back home without knowing what it's going to cost.

Weldon: That's correct, however, this goes in several phases, as I mentioned earlier. There has be a census taken of the school children that will be affected. The next phase will be to find the teachers who are willing to go to school to learn how to take

care of these children and learn how to teach them. The next phase is to find out just how much special equipment is going to be necessary, to find the school reooms in the school districts to set up the special education services associations. Several school districts can get together and form their own service association. That can be partially funded by the state or wholly funded by the state in various increments. It's a far reaching bill, but the, financial end of it could run to astronomical figures over a long period of time, it is my understanding.

McWilliams: I am going to vot for your bill. I just want to know who's going to pay for it, where it was coming from.

Weldon: The people of the state of Tennessee will

have to pay for this. They are paying for public education of all children that are able to get from school themselves. This will enable them to pay for the education of those children who absolutely do need it. They can be educated, they should be educated, and it's our responsiblity to see that they are. Mr. Speaker, I renew my motion for passage of House Bill 2053 on third and final reading.

Speaker: Gentleman from Hamilton County, Rep. Copeland.

Copeland: Mr. Weldon, over what time period does your bill provide that this will be implemented and placed into effect?

Weldon: In various phases, yes.

Copeland: Over how many years? Before we reach

completion?

Weldon: I anticipate that it would take approximately three years before we really know how much money it's going to take, how many children, and how many teachers are going to be needed.

Copeland: Thank you.

Speaker: Gentleman from Rutherford County, Rep. Bragg.

Bragg: Mr. Speaker, Lady Doyle and Lady Fleming, the questio about finance also have concerned me. We do have one bill in the hopper which would take care of the exceptional child and I think the fiscal note on that is $28 million. Now, I think that what, what we're moving into here is something that has been long

needed in TEnnessee, but everybody has shied away from it from the standpoint of cost. We're not talking about a pupil-teacher ration her of 25 or 30. We're talking a pupil-teacher ration here of maybe one on one or two and one, or three and one. These children are handicapped. Many of them are now being handled by private agencies, by charitable organizations, they're being taught as best they can. The teachers who do this work are highly trained teachers and they are highly specialixed in their, in their field. And when we get into the handicapped, we get into no only to those who are physically handicapped, but some who may be mentally handicapped. This is a far reaching program. The court cases in other states as have been stated have already indicated that this is an

area that we're going to have to approach. And I think it very likely that we probably ought to begin it on this small a scale in a step by step program, rather than be hit with a traumatic experience of having to do it all within one, one fell swoop, and, and one fatal slap at the budgets of Tennessee. Of, I don't know what it's going to cost. No one else knows what it's going to cost. It's going to be a very expensive program, but on the other hand, who is to deny that the handicapped child is not as eligible for whatever education and training he's get, he can get, and maybe he needs it even worse than one who is, is hale and hearty. So I think when you stop and think about the cost of this, you must disregard that and look at the philosophy of the program, the program itself. I urge you to

support this bill.

Speaker: Gentleman from Weakly County, Rep. Bates.

Bates: Mr. Speaker, members of the House, I'd like to rise in support of this bill. As we all the Constitution of this nation requires that education is the responsibility of the states. And ladies and gentlemen of this House, we have forgotten many Tennesseans in this state who are handicapped and who direly are in need of help. Many of them are mentally retarded, and I am for this bill expecially because of the mentally retarded groups. Many of them need help because they can develop to their maximum potentional if they have the proper education facilities. As Rep. Bragg alluded to, we do have many private

agencies that are helping them, but I think then that we have the responsiblity in this state to help them also. And I would urge the passage of this bill.

Speaker: Gentlemen from Shelby County, Rep. Dunavant.

Dunavant: Mr. Speaker, Members of the House, I certainly am for educated the handicapped to the extent of our ability. I don't think anyone in this House has any feeling otherwise than that. I've a great deal of concern about our ability to do what this bill sets forth to do in the time that is specified or set forth in this, in the provisions of this act. Her is, here are some factors that you might be interested in. This act is more comprehensive in its provisions than the legislation that any other state has now. This is, this came

from the Commissioner of Education. These states usually have allowed five years to im0plement the mandatory provisions, and it's just been said by my friend and colleague Rep. Weldon, that it would take three years under the provisions of this act. Now we have an estimation here of the cost of the first year of implementation, $9.5 million. That's a tremendous amount of money. We ought to go gull speed ahead. But I don't like to pass legislation that we can't fund. And I want us to be able to fund what we can do. Now, there have been, as you know, most of you have studied the budget much improvement in many areas for the handicapped. This is in the mental retardation area and the special educaitonal areas, and so forth. One thing further I would like to point out to

you is that, and I have dicussed this matter very seriously in some Fiscal Review Committee, subcommittee operations hearings, with the heads of institutions of higher learning in this state. Now, we just don't have enough qualified people right now to fully implement this program. I talked to President, Chanceller Archie Dykes about this, Dr. Sam, about this, about, them upping their programs, or stepping up their programs to provide more people who whould be equipped to handle this kind of education project. I did receive a letter back from Archie Dykes stating that he was interested in trying to plow into their programs at the University of Tennessee more programs to teach people how to handle these special educational problems. But this is going to take time, I

submit to you, ladies and gentlemen. You can't do this within a matter of a year or two. You've got to first first train your people. And, and I have serious doubts about us going into this program in this scope at this particular time. I think we ought to move into the area of, of providing assistanve to the handicapped in the way of educaiton to the extent of thier abilities as, as rapidly as we can, but I think we ought to remain fiscally responsible as we approach it, I think we ought to be realistic in the fact that we do not have in the state of Tennessee, or I think in America, with the advent of the consent judgement in passing in the state of Pennsylvania enough qualified instructors to deal with these people on the scale as indicated in this bill.

Speaker: Gentleman from Hamilton County, Rep. Engstrom.

Engstrom: Mr. Speaker, ladies and gentlemen of the House, I rise to join with my colleagues in support of this this bill. I do not agree with everything that my good friend Mr. Dunavant has said on it. I think there are several things that we are going to have to consider. To begin with, is to point out that it is responsiblity under our Constitution of this state to educate our children. The child that is handicapped needs special education. We're talking about spending dollars today that are going to make dollars for the state if we educate him, or it's going to cost dollars to the state if we put him in an institution. That's one side of this. Another side is that many states have stood by and said we'll do it later, and the

people have finally decided that now is the time to do it. So they have gone to the courts and they've forced people to do it. This cost an extremely large amount of money. It is unplanned, you have to go into it immediately, and I understand there is such a suit pending in this state. If this suit were passed, and we used the criteria that we found in Pennsylvania, we found in Texas, we found in some of the other states, it would cost about $77 million to this state in one whack. This bill that Mr. Weldon has has been well thought out. It is one that has had the input from some of the best minds in this nation in it. It is an excellent bill. It's one that phases it in, we're going to have to pay for this cost sometime. And I would urge everybody to search their conscienve and vote for this bill to give

our handicapped people of this state a chance to be a citizen of this state. Thank you.

Speaker: Mr. Weldon. Gentlemen from Montgomery County, Rep. Darnell.

Darnell: Mr. Speaker, ladies and gentlemen of the House, I don't think that we really have a great deal of choice in this matter. I think that if we'll look at other states, we will see that taxpayers' suits have been brough and the court decisions have been rendered that have forced the state to provide the services that Mr. Weldon is talking about here. At least with his bill, we'll have an opportunity to study the situation, see where we stand, and start to implement it over a period of time. It is going to be an expensive proposition. But it's no one which I think that we as

members of the General Assembly are going to have a great deal of choice over. If the courts do step in (tape break) and it appears that a taxpayers' suit is being held in abeyance until we make some decisions in this General Assemby. If we refuse to take steps that Mr. Weldon has asked us to take here, this suit will be brought, and I can, in my opinion at least, the outcome would be that the court would force the education system to provide these services, shich means that we would have to cut back on some of the programs we have, or rather this General Assemby is going to have to appropriate the money on our crash program basis, which is going to be much more expensive than it will be if we undertake this study. We'll have a period of time. The next General Assemby can come back. If we

need to make adjestments, we can do so. But I think this is a much needed step. And I think we ought to take the stand now, and go into it in a phased method that would save us a great deal of money and, and heartache and worry, than if we wait until the court forces us to do it in one fell swoop. I urge you to vote for the bill.

Speaker: Gentleman from Davidson County, Rep. Hicks.

Hicks: Mr. Speaker, members of the House, we have a good many programs involving handicapped people across the state. And I think this particular bill may eventually throw them all together. And when we have a piece of legislation of this type it makes me regret that I studied accounting instead of, instead of, public speaking, so that I can get up and try to

promote this kind of bill. I would urge each one of you to vote for it. It's badly needed program. And I hope that we can go along and help these kids.

Speaker: Gentleman from Shelby County, Rep. Powell.

Powell: Mr. Speaker, and members of the General Assemby, I don't know what we're really arguing about. I think we're arguing about back in the time that they used to only educate the male species of the family. ANd then we came and said well, the girls nees an education too. And then we said, well, think we should give the manority groups some education. Now we come along ansd saying why should we debate whether that a child that's handicapped whether it should have education. We shouldn't even be talking

about this. These people have just as much right to be educated as the female did, back when we used to not educate them. And what we're really doing is that we're educating people to put on the tax rolls, instead of of the welfare rolls, and it's nothing but legality that we shold do it, because, just because a kid cannot hear, coannot see, cannot walk properly, why should he be denied and education. In fact, in fact and in reality, that child should be educated more than the child that's healthy, because the one that's health will probably make some kind of way, but what about the other one that can on sit someplace. And do office work? The other one could do physical work. So I think that we shold all take into account of who does nees an education. So I remind you again that at one time we

didn't educate certain facets of our society and now we're talking about eduating the other facet. It should have been done years and years and years ago. So I think we should vote for this bill and get it out of the way and get started with it.

Speaker: Mr. Crowell.

Crowell: Mr. Speaker, ladies and gentlemen of the House, I think we're all aware that this is a meritorios piece of legislation. It's, it can be implemented ober a period of time by a gradual cost increase to the people of this state, but yet it's something that is very much needed, and I'm going to vote for it, and I urge every member of this House to vote for it. And Mr. Speaker, I move the previous question.

Speaker: Mr. Croswell's moved the previous

question. That motion has been properly seconded. Is there any objections? The chair sees no objection. So many members as favor the passage will vote aye when the bell rings. Those opposed will vote no. Let every member cast his vote when the bell rings. Has every member voted? Does any member desire to change his vote? Mr. Bonner votes aye. Mr. Clerk, record the vote. Mr. Hicks votes aye.

Clerk: Ayes 77, noes nothing.

APPENDIX M

STATE OF TENNESSEE

OFFICE OF THE

ATTORNEY GENERAL

400 JAMES ROBERTSON PARKWAY

NASHVILLE, TN 37343

December 20, 1991

OPINION NO. 91-101

Minimum Requirements of Local School Systems

QUESTIONS

1. Who takes over the local system(s) if, for lack of funding, the schools are closed before the statutory 100 days are completed?

2. What educational services are local systems/local governments required to provide in order to keep schools open with reading, transportation, administration?

3. What specific special education services and staffing levels must be maintained by LEAs?

4. If the state board of education is required to ?????? over "bankrupt" LEAs, how/when is control returned to local officials?

OPINIONS

1. There is no statutory provision for any entity to rule over a school system which closes for lack of funding with the possible exception of

special education services.

2. Each school district must meet the requirements of state statutes and regulations regarding mandatory administrators and coarse offerings. Transportation of students, with the possible exception of special education students, is not required.

3. Each school district must provide sufficient special education services and staffing to meet the requirements of state and federal law.

4. In light of the response to question one, no answer to question four is necessary.

ANALYSIS

1. T.C.A. 49-1-102(c) states in part: "There shall be a local public school system operated in each county." T.C.A. 49-3-314(c) provides in relevant part:

(c) In order for any LEA to receive state education finance funds as set forth in this part, such system shall meet the following conditions and requirements. In order to enforce the same, the commissioner may in his discretion, withhold a portion or all of the state education finance funds which the LEA is otherwise eligible to receive.

(1) Every LEA shall meet the requirements of state law as to the operation of such LEA.

(2) Every LEA and each school therein shall meet the rules, regulations and minimum standards established by the state board for the location, construction and operation of schools.

There are many statutatory and regulatory requirements imposed on a local education agency (LEA). Among them is a requirement that each

public school system maintain a term of not less than 200 days, including 180 days for classroom instruction. (T.C.A. 49-6-3004(a)).

The only enforcement mechanism provided by the statute is the withholding of state funds from an LEA which does not meet the 180 day requirement. T.C.A. 49-3-314(c). There is no statutory provision authorizing the Tennessee Department of Education or any other state body to "take over" all the functions of an LEA which closes schools for lack of funding.

The only possible exception relates to special education. Under T.C.A. 49-10-109(a)(I), the Commissioner of the Department of Education may withhold sate aid from a school district which fails to provide education to all qualified handicapped children. Under T.C.A. 49-10-109 (a)(3), the Commissioner may, at his discretion, provide the special education directly. However, under T.C.A. 49-10-109(c) and (d), all costs associated with direct

provision of special education by the state are charged back to the school district.

2. Under T.C.A. 49-3-314(c), quoted above, in order to receive state funds an LEA must meet the requirements standards established by the Tennessee Board of Education. It is not possible in this context to give an exhaustive list of educational services required but a few should be mentioned.

Under T.C.A. 49-6-302(a), each school district must establish and maintain as many elementary schools as may be necessary for the instruction of all children in the school district. Under T.C.A. 49-6-403, there must be at least one senior high school "which shall give at least one full course of study approved by the state board of education."

With regard to administrators, T.C.A. 40-5-412 requires each school each school with 9 or more teachers to have at least one full-time supervisory principal. In addition, each system is required by statute to have a superintendent. The rules

currently in effect also require, inter alia, supervising teachers of instruction, attendance supervisor, and materials supervising teacher. However, these requirements have been eliminated in new rules passed by the Board of Education but not yet in effect.

The rules of the Board of Education provide which areas of instruction must be offered and which areas may be offered. For instance, science and social studies courses are required. Driver education and computer technology are optional. In addition the rules proved the graduation requirement for various types of diplomas, including the courses and number of unites of each course which must be completed. A school district must comply with these curriculum requirements.

Transportation for most children is not required. Under T.C.A. 49-6-2101, boards of education are empowered to provide school transportation facilities. This statute is permissive

and not mandatory. However, provision of transportation may be required for some special education students.

3. Special education is controlled by T.C.A. 49-10-101, et seq., and by federal law. The local school district must provide sufficient services and staffing under the requirements of state and federal law. It is able to gibe a precise definition of what special education services and staffing levels must be maintained since they are controlled by the number of handicapped children in the district the nature of the needs of those children.

Under T.C.A. 49-10-302, each school district must supply annually to the Department of Education a report including "a precise statement of the extent the necessary education and services will be provide directly by the district pursuant to law requiring such educational provision....." Certainly, each school district comply with its annual statement.

4. In light of the answer to question number one, no responses to question four is necessary.

/ss/ Charles W. Burson
Attorney General

/ss/ John Knox Wade
Solicitor General

/ss/ Christine Moore
Deputy Attorney General

Requested by:

Senator Ward Crutchfield
Suite 10, Legislative Plaza
Nashville, TN 37243-0210

AN ACT to amend Tennessee Code Annotated, Section 49-2914, relative to certain definitions concerning the education of the handicapped.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1: Tennessee Code Annotated, Section 49-2914, is amended by deleting subsection A. in its entirety and substituting in lieu thereof the following:

A. "Handicapped child" means any child who is less than eighteen (18) years of age or who has not obtained a high school diploma or its equivalent and whose handicaps or capabilities are so great that he is unable to be educated or trained adequately in the regular education programs of the public schools without the provision of full-time or part-time special education services

and/or needed corrective and supportive services.

The term includes the mentally retarded; the speech or language impaired; the deaf and hearing impaired; the blind and visually impaired; the orthopedically handicapped and others of seriously impaired health; the seriously emotionally disturbed including those with severe behavioral disorders or severe social maladjustments; the multiple handicapped; the educationally delayed; and children with specific serious learning disabilities.

SECTION 2. Tennessee Code Annotated, Section 49-2914, is further amended by deleting subsection B. in its entirety and substituting in lieu thereof the following:

B. "Special education services "means classroom, school, home, hospital, institutional, or

other instruction necessary to meet the needs of handicapped children, special services, and corrective and supportive services required to assist handicapped children in taking advantage of, or responding to, educational programs.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.

COPY 1 - CHIEF CLERK (JOURNAL)

AMENDMENT NO. _____1_____

_____

/ss/ Signature of Sponsor

Senate No. 2296___

AMEND BILL by

House No. _____

By deleting subsection A., Section 1., in its entirety and substituting in lieu thereof the following:

A. "Handicapped child" means any handicapped child who is between the ages of four (4) and eighteen (18) years, or who is three (3) or four (4) years of age and is deaf, and whose handicap is such that his educational needs cannot be met in the

regular classes of the public school without special education services. The term "handicapped child" includes the mentally retarded; the deaf and hearing impaired; the speech impaired; the blind and visually impaired; the seriously emotionally disturbed; the orthopedically handicapped or other health impaired; or the child with specific learning disabilities, including, but not limited to, the perceptually handicapped, the emotionally conflicted, and the autistic child. The term "handicapped child" also includes the exceptionally gifted child whose intellectual ability is such that he cannot progress in the regular classroom programs without special education services. The term "handicapped child" includes only such child as is within the standards of eligibility for special education services which shall be established by regulations of the State Board

of Education within the limits herein provided.

COPY 1 - CHIEF CLERK (JOURNAL)

AMENDMENT NO. 2

/ss/Signature of Sponsor

Senate No. 2296

AMEND* BILL by

House No.

By deleting from the twelfth line of Section A. the following language:

"The term 'handicapped child' also includes the exceptionally gifted child whose intellectual ability is such that he cannot progress in the regular classroom programs without special education services."

COPY 1 - CHIEF CLERK (JOURNAL)

AMENDMENT NO. 3

/ss/ Signature of Sponsor

Senate No. 2296

AMEND* BILL by

House No.

By deleting in the tenth line of subsection A. the comma between the words "including" and "but" and the following language:

"but not limited to,"

And further amend in the eleventh line of subsection A. by deleting the following words:

"the emotionally conflicted,"

COPY 1 - CHIEF CLERK (JOURNAL)

AMENDMENT NO. 4

/ss/ Signature of Sponsor

Senate No. 2296

AMEND BILL by

House No.

By deleting in the tenth line subsection A. the comma between the words "including" and "but" another following language:

"But not limited to"

COPY 1 - CHIEF CLERK (JOURNAL)

AMENDMENT NO. 5

/ss/ Signature of Sponsor

Senate No. 2296

AMEND BILL by

House No. 2324

Deleting from the second paragraph the words and figures "Twenty- one (21)" and substituting in Lieu thereof the words and figures "Twenty-one (21)".

AN ACT to amend Tennessee Code Annotated, Chapter 29 of Title 49, relative to education of exceptional and handicapped children, and to repeal Tennessee Code Annotated, Sections 19-2901, 49-2902, 49-2918, 49-2920 through 49- 2928, 49-2930, 49-2931, 49-2942, 49,2943, 49- 2945, 49-2951, 49-2953, 49-2955, 49-2956 and 49-2957.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 49-2912, is amended by adding the following new sentence: "The state boards of education shall adopt rules and regulations, which it may modify from time to time, to implement the policy established herein and the provisions of sections 49-2942 through 49-2959."

SECTION 2. Tennessee Code Annotated, Section 49-2913, is amended in subsection A by

deleting the last sentence and substituting instead the following:

> Every state owned institution having custody of a handicapped child, whether through judicial commitment or otherwise, shall provide an educational program for such child in accordance with a plan to be approved by the commissioner of education. The educational program for a handicapped child in a state owned institution shall be financed through appropriations made by the General Assembly to such institution or its parent state agency and shall not be a charge upon any local school system. However, upon a determination by local school authorities that placement in a local school program is appropriate an upon agreement of institutional and local school authorities, a handicapped child in a state institution may receive his education in such local school

program. When such educational program is provided by the local school system, such child shall be included in that school system's student population for purposes of receiving state school funds, and the institution shall not be required to pay for the educational program being provided by the local school system. The school system providing the educational program to such child shall not be required to provide medical, residential, or other support services provided by the institution.

Tennessee Code Annotated, Section 49-2913, is further amended by deleting from subsection C the words and punctuation "special education services associations,".

Tennessee Code Annotated, Section 49-2913, is further amended by adding a new subsection "F" as follows:

F. For the purpose of placement in an educational program of a local school system, a handicapped child in the custody of a state owned institution or a state agency is deemed to be a resident of the school system in which the institution is located or in which the agency has housed the child. If, pursuant, to lawful order of the institution's chief administrative officer, such child resides elsewhere, he shall be deemed to be a resident of the school system in which he lives pursuant to such order. The school system of such child's residence as determined in subsection A above. However, such school system may, by contract, require financial contribution from the school system that is the residence of such child's parents or legal guardian. The contract shall be approved by the commissioner of education, who shall base his approval on the equitable nature of the

share to be borne by each of the contracting systems.

SECTION 3. Tennessee Code Annotated, Section 49-2914, is amended by deleting subsections A and B in their entirety and substituting instead the following new subsections:

A. "Handicapped child" means a person between the ages of three (3) and twenty-one (21) years who because of mental, physical, emotional, or learning problems requires special education services.

B. "Special education services" means classroom, home hospital, institutional, or other instruction; and administrative, special transportation, corrective, or supportive services required to assist handicapped children in taking advantage of educational programs and services.

Tennessee Code Annotated, Section 49-2914, is further amended by adding thereto a new subsection "E" as follows:

E. The state board of education shall establish eligibility criteria for handicapped children as defined in this section and shall specify the nature of special education services approvable under this section.

SECTION 4. Tennessee Code Annotated, Section 49-2919, is amended by deleting the section in its entirety and substituting instead the following:

Any schools district may independently provide education, corrective and supporting services for handicapped children, as set forth in 49-2912 -- 49-2959, and in any other laws and regulations of the state board of education. Cooperative or contractual

provision of services, as otherwise authorized by law or regulation of the state board of education may be the means whereby participating school systems perform all of their special education functions or perform only specified special education functions. Special education functions not provided by such cooperative or contractual methods shall continue to be provided by the system itself or in some other manner pursuant to law.

SECTION 5. Tennessee Code Annotated, Section 49-2929, is amended by deleting the figures and symbols " 49-2915 - 49-2931" and substituting instead the words "this chapter".

SECTION 6. Tennessee Code Annotated, Section 49-2933, is amended by deleting from the first sentence the words "and the state board of education".

Tennessee Code Annotated, Section 49-2933, is further amended by deleting the next to the last paragraph and substituting instead the following:

> After submission of the report required by this section, the school system shall submit such supplemental and additional reports as the commissioner of education, may require, in order to keep the plan current. The commissioner of education shall prescribe the due dates, form, and all other necessary or appropriate matter relating to such reports.

SECTION 7. Tennessee Code Annotated, Section 49-2938, is amended by deleting from the second sentence the words and figures "In addition to any arrangements that may be made pursuant to 49-2915 -- 49-2931," and by capitalizing the first letter of the next succeeding word.

SECTION 8. Tennessee Code Annotated,

Section 49-2941, is amended by deleting from the second sentence of subsection A the word "department" and substituting instead of the word "board".

SECTION 9. Tennessee Code Annotated, Section 49-2946, is amended by deleting the section in its entirety and substituting instead the following:

> Each schools system and state institution may establish and maintain a special education resources center which may perform the functions of procurement, maintenance, servicing, and distribution of special education equipment, supplies, and materials to the schools of the system, to the institutions, and to any other persons or entities to which they are made available pursuant to law. Special education equipment, supplies, and materials made available to schools and other entities

may be provided, mad available, and inventoried by such center.

To the extent of its capabilities, a special education resources center may establish and operate or cooperate with other such centers in establishing and operating programs of in-service training as approved by the commissioner of education acting pursuant to 49-105(4) and 49-1709.

Centers established under this section may cooperate and borrow or otherwise obtain from other centers, federal and governmental agencies including the state department of education, and appropriate private agencies such equipment, supplies and materials as may be available therefrom and may be reasonable for their proper distribution to and collection from schools and other entities

entitled to receive and use them.

It is the purpose of this section to promote the efficient and expert use of special education aids and to discourage their positioned, kept or made available for use to persons and under conditions not conductive to their proper employment. The commissioner of education may develop, revise and deep in force guidelines for the operation of centers and for their relationships to schools and other proper recipients. The division for the education of the handicapped may assist centers in their programs of training, equipment servicing, distribution, and general administration.

SECTION 10. Tennessee Code Annotated, Section 49-2947, is amended by deleting from the first sentence of the second paragraph the word

"registered".

SECTION 11. Tennessee Code Annotated, Section 49-2949, is amended by deleting the words "department of education" wherever they appear and substituting instead the words "commissioner of education": and is further amended by regularizing all pronouns to conform to this word change.

SECTION 12. Tennessee Code Annotated, Section 49-2952, is amended by deleting the section in its entirety and substituting instead the following:

> The state commissioner of education, under such reasonable regulations as he may establish, may make training grants or fellowship grants available to professional and para-professional personnel desiring work in

programs for the education of the handicapped children, for either part-time or full-time study, to qualify them for participation in the handicapped program under rules and regulations of the state board of education. The commissioner may establish reasonable regulations on the employment of such persons as have received grants or in the alternative may establish reasonable regulations for the repayment of such grants, and he may enforce such regulations by appropriate judicial action.

SECTION 13. Tennessee Code Annotated, Section 49-2954, is amended by deleting the section in its entirety and substituting instead the following:

A. Every school system that constructs, remodels, renovates, expands, or modifies school buildings or other structures intended

as adjuncts thereto shall plan, design, construct, and equip such buildings and structures in such manner and with such materials as will facilitate use by all handicapped children who may reasonably be expected to enter upon the remise and to make use of them for instructional, remedial, or supplementary services. This subsection shall be interpreted and administered in the light of the policy of this state to educate and provide services for handicapped children in or in close proximity to the regular schools to the maximum extent practicable.

B. The state board of education shall issue and may from time to time revise rules and regulations to implement this section. Such rules and regulations shall include procedures for submission and review of plans and specifications and may include requirements

for additional information to be furnished by school systems or other legal entities constructing or proposing to construct special education facilities. All such plans and specifications shall be approved by the commissioner of education if they meet the aforesaid rules and regulations.

C. Public and private builders of special education facilities may consult with the commissioner of education or his designated representative concerning any matter related to the administration of this section or its application to any special education facility proposed to be constructed or operated by them. No such consultation and no representation made shall be construed as an approval of plans and specifications. Only plans and specifications that have been approved pursuant to this section shall be

used in the construction, renovation, expansion, or modification of public school buildings and special education facilities.

SECTION 14. Tennessee Code Annotated, Section 49-2958, is amended by deleting the word "department" wherever it appears and substituting instead the word "board".

SECTION 15. Tennessee Code Annotated, Section 49-2959, is amended by deleting the section in its entirety and substituting instead the following:

The state financial aid provided to school systems and other entities entitled by law to receive aid for educational and related services being provided by them to handicapped children shall be appropriate by the General Assembly in accordance with the usual appropriations procedures and shall be expended by such school systems and entities in

accordance with the rules and regulations of the state board of education.

SECTION 16. Tennessee Code Annotated, Sections 49-2901, 49-2902, 49-2918, 49-2920 through 49-2928, 49-2930, 49-2931, 49-2942, 49-2943, 49-2945, 49-2951, 49-2953, 49-2955, 49-2956 and 49-2957 are repealed.

SECTION 17. This act shall take effect July 1, 1977, the public welfare requiring it.

PUBLIC ACTS 1978 [Chapter 573]

CHAPTER NO. 573

HOUSE BILL NO. 2172

By Lahlee, Work, Ford (Shelby), Bragg, Rhinehart, Starnes, Shockley, McKinney, Atchley, Butler, Davidson (Robertson), Pickering

Substituted for: Senate Bill No. 2220

By Hicks, O'Brien, Harvill

AN ACT to amend Tennessee Code Annotated, Section 49-2914 and to repeal Tennessee Code Annotated, Section 49-2901 so as to consolidate and harmonize the definition of children entitled to special education services as a result of handicaps.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 49-2914 A, is amended by adding a new sentence at the end of the subsection as follows:

"Handicapped child" shall include all children down to and including the age of three (3) years who are deaf.

SECTION 2. Tennessee Code Annotated, Section 49-2901, is repealed.

SECTION 3. This Act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: March 1, 1978

Ned R. McWhether,
SPEAKER OF THE HOUSE OF REPRESENTATIVES

John S. Wilder,
SPEAKER OF THE SENATE

APPROVED: March 8, 1978

Ray Blanton,
GOVERNOR

[Chapter 574] PUBLIC ACTS 1978

CHAPTER NO. 574

HOUSE BILL NO. 2168

By Lashlee, Work, Ford (Shelby), Bragg, Rhinehart, Starmes, Shockley, McKinney, Atchley, Butler, Davidson (Robertson), Pickering

Substituted for: Senate Bill No. 2221

By Harvill, O'Brien

AN ACT to amend Tennessee Code Annotated, Title 49, Chapter 29, relative to the education of handicapped children.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE

SECTION 1. Tennessee Code Annotated, Section 49-2912, is amended by adding at the end

of the section, the following sentence:

> The state board of education shall adopt rules and regulations, which it may modify from the time to time, to implement the policy established herein and the provisions of Tennessee Code Annotated, Sections 49-2912 through 49-2959.

SECTION 2. Tennessee Code Annotated, Section 49-2929 is amended by deleting the symbols and figures "Section 49-2915 -- 49 2931" and substituting therefor the words "this chapter".

SECTION 3. Tennessee Code Annotated, Section 49-2938, is amended by deleting the symbols and figures "Section 49-2915 -- 49-2931" in the second sentence of the section and substituting therefor the words "this chapter".

SECTION 4. Tennessee Code Annotated, Section 49-2941, is amended by deleting from the second sentence of subsection A the word

"department" and substituting the word "board".

SECTION 5. Tennessee Code Annotated, Section 49-2947, is amended by deleting from the first sentence of the second paragraph the word "registered".

SECTION 6. Tennessee Code Annotated, Section 49-2949, is amended by deleting the words "department of education" in paragraphs 1, 2, 3 and 5 of the section and substituting therefor, the words "commissioner of education". Section 49-2949, paragraphs 1, 2, 3, and 5 are further amended by changing any necessary pronouns so as to conform to the substitution of "commissioner" for "department".

SECTION 7. Tennessee Code Annotated, Section 49-2954, is amended by deleting the section in its entirety and substituting therefor the following:

A. Every school system that constructs, remodels, renovated, expands, or modifies

school buildings or other structures intended as adjuncts thereto shall plan, design, construct, and equip such buildings and structures in such manner and with such materials as will facilitate use by all handicapped children who may reasonably be expected to enter upon the premises and to make use of them for instructional, remedial, or supplementary services. This subsection shall be interpreted and administered in the light of the policy of this state to educate and provide services for handicapped children in or in close proximity to the regular schools to the maximum extent practicable.

B. The state board of education shall issue and may from time to time revise rules and regulations to implement this section. Such rules and regulations shall include procedures for submission and review of plans and

specifications and may include requirements for additional information to be furnished by schools systems or other legal entities constructing or proposing to construct special education facilities. All such plans and specifications shall be approved by the commissioner of education if they meet the aforesaid rules and regulations.

C. Public and private builders of special education facilities may consult with the commissioner of education or his designated representative concerning any matter related to the administration of this section or its application to any special education facility proposed to be constructed or operated by them. No such consultation and no representation made shall be construed as an approval of plans and specifications. Only plans and specifications that have been

approved pursuant to this section shall be used in the construction, renovation, expansion, or modification of public school buildings and special education facilities.

SECTION 8. Tennessee Code Annotated, Section 49-2958, is amended by deleting the word "department" wherever it appears and substituting therefor the word "board".

SECTION 9. Tennessee Code Annotated, Section 49-2918, is repealed in its entirety.

SECTION 10. Tennessee Code Annotated, Section 49-2955, is repealed in its entirety.

SECTION 11. Tennessee Code Annotated, Section 49-2956 and 49-2957, are repealed in their entireties.

SECTION 12. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be

given effect without the invalid provision or application, and to that end the provisions of this Act are declared to be severable.

SECTION 13. This Act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: March 1, 1978

Ned R. McWherter,
SPEAKER OF THE HOUSE OF REPRESENTATIVES

John S. Wilder,
SPEAKER OF THE SENATE

APPROVED: March 8, 1978

Ray Blanton,
GOVERNOR

HOUSE BILL NO. 2167

By Lashlee, Work, Ford (Shelby), DeBerry, Bragg, Rhinehart,Starnes, Shockley, McKinney, Atchley, Butler, Davidson (Robertson), Pickering

AN ACT to amend Tennessee Code Annotated, Section 2913, relative to the responsibility for regular and special education for handicapped children and to provide the commissioner of education with authority to coordinate the provision of educational services to all handicapped children.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE

SECTION 1. Tennessee Code Annotated, Section 49-2913, is amended by deleting subsection (A) in its entirety and substituting instead the following subsection:

(A) The state board of education shall provide or cause to be provided by school districts all regular and special education, corrective and supporting services required by handicapped children to the end that they shall receive the benefits of a free public education appropriate to their needs. It may permit a local school system board of education to contract with a suitable private institution or organization for the provision or organization for the provision of such approved facilities and services for handicapped children, and to permit the expenditure of funds by such local school system board of education to constitute approved expenditures hereunder, provided that the authority of the state commissioner of education, the local superintendent of schools, and all public school officers shall be as full and ample in such private institutions as in any school of the said local school system, and provided further that the facilities and

services of such private institutions meet the minimum standards as prescribed by the state board of education. The commissioner of education shall have the duty and the authority to organize, supervise, and coordinate all educational services of any sort provided by agencies and departments of the state for handicapped children in the custody or under the jurisdiction of such agencies and departments. Within ninety (90) days after the effective date of this act, and quarterly thereafter, the head of each state agency or department providing educational services to handicapped children shall report the number of handicapped children served by it, the type of educational services provided, and the expenditure necessitated for such services. After such expenditures are identified, the commissioner of education must either request that such funds be transferred in subsequent fiscal years to the appropriations for

the department of education or recommend that such funds continue to be appropriated to and administered by the appropriate department, under the ultimate supervision of the commissioner of education. It is expressly intended that if educational services for handicapped children in the custody or under the supervision of other state agencies or departments are funded through the department of education, then existing agency or department appropriations shall be reduced by the amount of the transferred expenditures. It is further intended that the department of education through its commissioner and through the state board of education shall be the agency responsible under 40 U.S.C. 1412, for insuring the compliance of all local and state agencies and departments are funded through the department of education, then existing agency

or department appropriations shall be reduced by the amount of the transferred expenditures. It is further intended that the department of education through its commissioner and through the state board of education shall be the agency responsible under 40 U.S.C. 1412, for insuring the compliance of all local and state agencies and departments with the provisions of federal law concerning education of handicapped children and, accordingly, the department is granted such authority as is necessary to coordinate educational programs for handicapped children on both the local and state level so as to meet requirements of both federal and state law.

SECTION 2. This act shall take effect July 1, 1978, the public welfare requiring it.

AN ACT to amend Tennessee Code Annotated, Section 49-2913, relative to the responsibility for regular and special education for handicapped children, to provide the commissioner of education with authority to coordinate the provision of educational services to all handicapped children, and to establish a special committee to monitor such coordination.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 49-2913, is amended by deleting subsection (A) in its entirety and substituting instead the following subsection:

(A)

(1) The state board of education shall provide or cause to be provided by school

districts all regular and special education, corrective and supporting services required by handicapped children to the end that they shall receive the benefits of a free education appropriate to their needs. It may permit a local school system board of education to contract with a suitable private institution or organization for the provision of such approved facilities and services for handicapped children, and to permit the expenditure of funds by such local school system board of education to constitute approved expenditures hereunder, provided that the authority of the state commissioner of education, the local superintendent of schools, and all public school officers shall be as full and ample in such private institution as in any school of the said local school system, and provided further that the facilities and services of such private institution meet the minimum standards as prescribed by the state board of education.

(2) The commissioner of education shall have the duty and the authority to organize, supervise, and coordinate all educational services of any sort provided by agencies and departments of the state for handicapped children in the custody or under the jurisdiction of such agencies and departments.

(3) Within ninety (90) days after the effective date of this act, and quarterly thereafter, the head of each state agency or department providing educational services to handicapped children served by it, the type of educational service provided, and the expenditures necessitated for such service to the commissioner of education.

(4) After such expenditures are identified, the commissioner of education must either request that such funds be transferred in subsequent fiscal years to the appropriations for the department of education or recommend

that such funds continue to be appropriated to and administered by the appropriate department, under the ultimate supervision of the commissioner of education. It is expressly intended that if educational services for handicapped children in the custody or under the supervision of other state agencies or departments are funded through the department of education, then existing agency or department appropriations shall be reduced by the amount of the transferred expenditures.

(5) Upon receipt by the commissioner of education of quarterly reports required by subsection (A)(3), he shall forward copies of such reports to the special joint committee on the education of the handicapped which shall be composed of four (4) members of the education committee of the House of Representatives and four (4) members of the education committee of the Senate, appointed by the respective speakers

at the beginning of each general assembly for the duration thereof. The committee shall meet at least quarterly to examine the reports forwarded to it an to monitor the actions of the commissioners and departments in implementing and maintaining the coordination of educational services to the handicapped provided for herein.

(6) The department of education through its commissioner and through the state board of education shall be the agency responsible under 40 U.S.C. 1412, for insuring the compliance of all local and state agencies and departments with the provisions of federal law concerning education of handicapped children and, accordingly the department is granted such authority as is necessary to coordinate educational programs for handicapped children on both the local and state level so as to meet requirements of both federal and state law.

SECTION 2. This act shall take effect July 1, 1980, the public welfare requiring it.

AMENDMENT NO. 1

_____

Signature of Sponsor

AMEND Senate Bill No. _____

House Bill No. 1834

By adding after the words "private institution" appearing in lines 19 and 21 of the amendatory language (A)(1), the words "or organization".

AND

By deleting subsection (A)(5) of the amendatory language and renumbering the succeeding subsection accordingly.

CHAPTER NO. 150

SENATE BILL NO. 318

By O'Brien

Substituted for: House Bill No. 644

By Cobb

AN ACT to amend Tennessee Code Annotated, Section 49-214, relative to duty of boards of education to supply copies of board minutes and corrections to presidents of local education associations.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated 214(12), is amended by deleting the words "as corrected and approved" and substituting in lieu the words "no more than thirty (30) days after the board meeting or at the time they are mailed to or otherwise

provided to members of the board, if such is earlier"; and further amend Section 49-214(12) by adding a new sentence to read:

> Any subsequent corrections, modifications, or changes shall be distributed in the same manner.

SECTION 2. This act shall take effect upon becoming law, the public welfare requiring it.

Chapter No. 151

PUBLIC ACTS, 1981

PASSED: April 6, 1981

John S. Wilder,

SPEAKER OF THE SENATE

Ned R. McWherter,

SPEAKER OF THE HOUSE OF REPRESENTATIVES

APPROVED: April 17, 1981

Lamar Alexander,

GOVERNOR

CHAPTER NO. 151

SENATE BILL NO. 523

By Burks, Crockett

Substituted for: House Bill No. 354

By Wood, Bell (Knox), Lashlee, Love, Naifeh, Tanner, Wallace, Davis (Gibson), Crain, Dills, Stallings

AN ACT to amend Tennessee Code Annotated, Section 49-2914, relative to exceptional and handicapped children.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 49-2914(A), is amended by deleting the words and punctuation ", and socially maladjusted" in the second sentence thereof.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: April 6, 1981

John S. Wilder,
SPEAKER OF THE SENATE

Ned R. McWherter,
SPEAKER OF THE HOUSE OF REPRESENTATIVES

APPROVED: APRIL 17, 1981

Lamar Alexander,
GOVERNOR

CHAPTER NO. 152

SENATE BILL NO. 559

By Hamilton

Substituted for : House Bill No. 73

By Kernell

CHAPTER NO. 281

SENATE BILL NO. 1144

By Koella, Garland

Substituted for: House Bill No. 1008

By Henry (Roane), Lashlee, Stafford, Carter, Henry (Blount), Robinson (Washington), Harrill

AN ACT to amend Tennessee Code Annotated, Title 49, Chapter 29 relative to the definition of a handicapped child.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE

SECTION 1. Tennessee Code Annotated, Section 49-2914, is amended by deleting in subsection (1) the words "and pregnancy" and "functionally retarded, and socially maladjusted".

SECTION 2. This act shall take effect upon becoming law, the public welfare requiring it, but shall not act to deprive any person of any services being received by such person as a handicapped child during the 1980-1981 school year.

PASSED: April 23, 1981

John S. Wilder,
SPEAKER OF THE SENATE

Ned R. McWherter,
SPEAKER OF THE HOUSE OF REPRESENTATIVES

APPROVED: May 11, 1981

Lamar Alexander,
GOVERNOR

CHAPTER NO. 284

HOUSE BILL NO. 623

By Bushing, Odom, Garrett

Substituted for: Senate Bill No. 875

By Haynes, Williams, Shockly

AN ACT to amend Tennessee Code Annotated, Section 46-3-306, relating to the expenditure of state educational funds by local educational agencies.

WHEREAS, federal law prohibits the supplanting of state special education fund with federal special education funds; now,therefore,

SECTION 1. Tennessee Code Annotated, Section 49-3-306(4), is amended by the removal of the period (.) at the end of that section, and the addition of the following ", except that one- hundred

percent (100%) of funds earned by special education shall be spent on special education".

SECTION 2. This Act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: April 20, 1987

_____

/ss/ SPEAKER OF THE SENATE

_____

/ss/ SPEAKER OF THE HOUSE OF REPRESENTATIVES

APPROVED this 4th day of April, 1988.

_____

/ss/ GOVERNOR

CHAPTER 677

SENATE BILL 2171

By Haynes

Substituted for: House Bill No. 1932

By Odom, Bushing

AN ACT to amend Tennessee Code Annotated, Section 49-10-102, relative to eligibility for special education.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE

SECTION 1. Tennessee Code Annotated, Section 49-10-102(1), is amended by adding the following sentence after the sentence ending with the word "thereof".

Any handicapped child who turns twenty-two (22) between the commencement of the school

year in August and the conclusion of the school year the following June, will continue to be a "handicapped child" for the remainder of that school year.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: March 30, 1988

/ss/ SPEAKER OF THE SENATE

/ss/ SPEAKER OF THE HOUSE OF REPRESENTATIVES

APPROVED this 4th day of April, 1988.

/ss/ GOVERNOR

FISCAL NOTE

TO: Chief Clerk of the Senate
Chief Clerk of the House

FROM: Donald L. Morton, Executive Director

DATE: March 31, 1989

SUBJECT: Senate Bill 1109 - House Bill 886

Senate Bill 1109 includes in the definitions of "handicapped child" those children with dyslexia and requires that the appropriate individuals instruction shall be provided for children for children with dyslexia using teaching techniques specifically aimed at helping the child overcome the handicap of dyslexia.

It is estimated that the bill if enacted will result in an result in an increase in state expenditures. However, since the number of children who have dyslexia and will require special

individual instruction is not known the increase in state expenditures cannot reasonably be determined but can reasonably be estimated to exceed $1,000,000.

For information purposes a child taught under special education Option 4 will cost $895 per year and a child taught under special education Option 5 will cost $1567 per year.

This is to duly certify that the information contained herein is true and correct to the best of my knowledge.

/ss/ Donald L. Morton

Executive Director

SENATE BILL 1109 - HOUSE BILL 886

Filed for Introduction on 2/1/89

SENATE BILL NO. 1109

by

Dunavant

AN ACT relative to the education of children with dyslexia and to amend Tennessee Code Annotated, Title 49, Chapter 10, Part 1.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 49-10-102, is amended in item (1)(A) by adding the language "children with dyslexia;" between the language "the speech and/or language impaired;" and "the deaf and hearing impaired".

SECTION 2. Tennessee Code Annotated, Section 49-10-103, is amended in subdivision (c)(1)

by adding the following sentence to the end of the subdivision:

For the children with dyslexia, appropriate individual instruction shall be provided using teaching techniques specifically aimed at helping the child overcome the handicap of dyslexia.

SECTION 3. This act shall take effect on July 1, 1989 the public welfare requiring it.

CHAPTER NO. 421

HOUSE BILL NO. 1129

By Turner (Hamilton), Bell, Yelton, Odom, Cross, Clark, Curlee, Purcell, Henry (Roane)

Substituted for: Senate Bill No. 1208

By Henry, Cohen, Williams, Albright, Lashlee, O'Brien, Cooper

AN ACT to amend Tennessee Code Annotated, Title 49, Chapter 10, relative to education of the handicapped.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE

SECTION 1. Tennessee Code Annotated, Section 49-10-102, is amended by adding the subdivision designation "(A)" immediately after the subdivision designation "(1)", by redesignating the present subdivision designation "(A)" to be "(B)", by deleting present subdivision (1)(B), in its entirety,

and by deleting the word and figure "four (4)" in the new subdivision (1)(A) and substituting the word and figure "three (3)".

SECTION 2. For the purpose of developing and promulgating necessary regulations or other planning, this act shall take effect upon becoming law, the public welfare requiring it. For all other purposes it shall take effect July 1, 1991, in order to apply for the 1991-1992 school year.

PASSED: May 23, 1989

_____

/ss/ Ed Murray, Speaker

HOUSE OF REPRESENTATIVES

_____

/ss/ John S. Wilder

SPEAKER OF THE SENATE

APPROVED this _____ day of May, 1989.

APPENDIX N

UNITED STATED COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOE, a minor, by and
through his parents and next
friends, JAMES AND MARY DOE
Plaintiff - Appellant

vs.

CASE NO. 92-5996

THE BOARD OF EDUCATION OF
TULLAHOMA CITY SCHOOLS; CHARLES
EMBRY, Superintendent of Schools,
Tullahoma, Tennessee
Defendants - Appellees

BOB TIPPS, in his official capacity
as the Right to Education Officer
of the State of Tennessee
Defendant

APPELLANT'S DESIGNATION OF APPENDIX CONTENTS

Appellant, pursuant to Sixth Circuit Rule 11(b), hereby designates the following filings in the district court's records as items to be included in the joint appendix:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NUMBER
Complaint	08/21/90	1
Motion for Preliminary Injunction	08/21/90	2
Affidavit of Morris Lovejoy	08/27/90	9
Order - U.S.D.C.	09/06/90	15
Agreed Order - U.S.D.C.	09/24/90	20
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Order - U.S.D.C.	07/17/92	48
Notice of Appeal	07/27/92	49

Respectfully submitted,

ss/Shane Usuary

Supreme Court, U.S.
FILED
MAY - 2 1994
OFFICE OF THE CLERK

No. 93-1641

In The

Supreme Court of the United States

October Term, 1993

JOHN DOE, A MINOR, BY AND THROUGH HIS NEXT FRIENDS AND PARENTS JAMES AND MARY DOE,

Petitioners,

v.

THE BOARD OF EDUCATION OF TULLAHOMA CITY SCHOOLS; CHARLES EMBRY, SUPERINTENDENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN D. KITCH
Counsel of Record
for Respondents

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(615) 385-9911

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER THE TENNESSEE SPECIAL EDUCATION STATUTE DOES NOT REQUIRE A HIGHER STANDARD FOR THE EDUCATION OF DISABLED CHILDREN THAN THE FEDERAL STANDARD UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 20 U.S.C.A. § 1400 *ET SEQ.* (WEST SUPP. 1992), AS INTERPRETED BY THIS COURT.

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II. THERE IS NO CONFLICT BETWEEN DECISIONS OF THIS COURT OR ANY OTHER FEDERAL APPELLATE COURT AND DECISIONS OF A STATE COURT OF LAST RESORT, BECAUSE NEITHER THE U.S. SUPREME COURT NOR ANY OTHER CIRCUIT HAS EVER INTERPRETED THE TENNESSEE STATUTORY LANGUAGE AT ISSUE 6

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No. 93-1641

In The

Supreme Court of the United States

October Term, 1993

JOHN DOE, A MINOR, BY AND THROUGH HIS NEXT FRIENDS AND PARENTS JAMES AND MARY DOE,

Petitioners,

v.

THE BOARD OF EDUCATION OF TULLAHOMA CITY SCHOOLS; CHARLES EMBRY, SUPERINTENDENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, the Board of Education of Tullahoma City Schools and Charles Embry, Superintendent, respectfully pray that the writ of certiorari requested by the Petition be denied.

JURISDICTION

Invoking federal jurisdiction under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, petitioners brought this suit in the United States District Court for the Eastern District of Tennessee after an administrative decision in favor of the respondents. On May 29, 1992, the Eastern District entered judgment for the respondents.

On petitioners' appeal, the Sixth Circuit on November 5, 1993, entered a judgment and an opinion affirming the Eastern District's decision. No petition for rehearing was filed.

STATEMENT OF THE CASE

The respondent incorporates by reference the statement of the facts found in the opinion of the Court of Appeals below. *Doe by and through Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d 455, 456-57 (6th Cir. 1993).

REASONS FOR DENYING THE WRIT

I. THE CIRCUITS ARE NOT IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT NOR WITH EACH OTHER REGARDING THIS ISSUE.

Petitioners argue that the Court should grant review in this case because of a claimed conflict between the circuits on the issue of state standards for special education.[1] This case, however, does not present a conflict, because the "conflicting" cases cited by the petitioners all agree that a state may impose higher standards in special education cases. The differing holdings in the cases result from the differing state laws in each case, each with its own statutory language and state court interpretation background.

The petitioners correctly state that the First and Third Circuits have held that a state may choose to impose higher standards upon school districts in special education cases than those under the federal Individuals with Disabilities Education Act. No split between the circuits is evident in this finding, however, since the Sixth Circuit acknowledges and reaffirms this view in the present case. *See Doe by and through Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d 455, 457 (6th Cir. 1993): "In this, and other circuits, it is settled that 'even if a school district complies with federal law, it may still violate the [federal] Act if it fails to satisfy more extensive state protections that may also be in place.' " (citations omitted).

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[1] This Court has never dealt with issues involving the Tennessee special educational law.

The First Circuit case cited by the petitioner, *David D. v. Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985), presents no conflict with the present Sixth Circuit decision. The *David D.* court held that there is no Eleventh Amendment immunity in special education cases brought in federal court. The court also found that there was a higher standard under Massachusetts state law in special education cases. However, this finding was not based solely upon broad introductory language taken out of context, such as the petitioners urge in this case. The First Circuit decision rests upon a clearer statutory mandate which had previously been interpreted by Massachusetts' highest court. In *Stock v. Massachusetts Hospital School*, 392 Mass. 205, 211, 467 N.E.2d 448, 453 (1984), the court held that Massachusetts law requires the Department of Education to administer special education programs "to assure the maximum possible development of a child with special needs." No Tennessee state court case has been cited by petitioners interpreting the relevant statute.

The Third Circuit case cited by the petitioners is similarly distinguishable from the Sixth Circuit's decision in this case. In *Geis v. Board of Educ. of Parsippany-Troy Hills*, 774 F.2d 575 (3d Cir. 1985), the court held first that Eleventh Amendment principles do not prevent the federal courts from enforcing a higher state standard in special education cases and second, that New Jersey law did require a higher standard. Unlike the Tennessee statute at issue, however, the New Jersey law contained a more detailed description of the duties of the local school districts:

> The Legislature hereby finds and determines that the security and welfare of the State require

> that all school-age children be assured *the fullest possible opportunity to develop their intellectual capacities*. In order to achieve this objective it is the intent of this Legislature to require that the State and local communities identify and provide remedial services for handicapped children in both public and nonpublic schools.

N.J.Stat.Ann § 18A:46-19.1 (West Supp. 1985) quoted by *Geis*, 774 F.2d 575, 582 (emphasis in quotation). Further, the *Geis* court had additional statutory language to rely upon in its interpretation of the New Jersey standard: special education students were to be provided services "according to how the pupil can best achieve success in learning . . . " N.J.Admin.Code tit. 6 § 6:28-2.1 (1978) (repealed).

It becomes even more apparent that there is no conflict between the Third Circuit and the Sixth Circuit in view of the fact that the holding in *Geis* was rendered moot when New Jersey decided that it wished to conform to the federal standard in special education cases. *See Lascari v. Bd. of Educ. of the Ramapo Indian Hills Regional High School*, 116 N.J. 30, 47-48, 560 A.2d 1180, 1189-1190 (1989).[2]

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[2] "For the future, we note that the Department of Education has adopted new regulations, which took effect after oral argument on May 15, 1989. One of those regulations, N.J.A.C. 6:28-1.1, adopts the federal standard, which Rowley defines as an education from which the child could benefit. 458 U.S. at 200, 102 S.Ct. at 3048, 73 L.Ed.2d at 708. Previously, the United States Court of Appeals for the Third Circuit had interpreted the New Jersey statutory and regulatory scheme as providing a higher level of education. Board of Educ. E. Windsor Regional School v. Diamond, 808 F.2d 987, 992 (3d Cir.1986). As the comments to

II. THERE IS NO CONFLICT BETWEEN DECISIONS OF THIS COURT OR ANY OTHER FEDERAL APPELLATE COURT AND DECISIONS OF A STATE COURT OF LAST RESORT, BECAUSE NEITHER THE U.S. SUPREME COURT NOR ANY OTHER CIRCUIT HAS EVER INTERPRETED THE TENNESSEE STATUTORY LANGUAGE AT ISSUE.

Supreme Court Rule 17.1(c) provides that the Court will consider review where a "federal court of appeals has decided an important question of *federal* law which has not been, but should be, settled by this Court. . . . " (emphasis added). The questions presented by the petitioner present this Court with a single issue of Tennessee state law – not an issue of federal law. The petitioners argue that the Tennessee special education law requires school districts to "maximize the capabilities" of special education students. Neither the U.S. Supreme Court, any U.S. Court of Appeals, nor any Tennessee state court has ever held that this provision of the Tennessee code has any substantive effect. In fact, the Iowa Supreme Court has interpreted identical language – "maximize the capabilities" – found in the prefatory language to its own special education statute, holding that the Iowa standard for special education children equated to the federal standard. In *Buchholtz v. Iowa Dept. of Public Instr.*, 315 N.W.2d 789 (Iowa 1982), the court determined that the appropriate educational standard was that of *Board of Education v.*

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the 1989 regulations make clear, the Department of Education disagrees with that interpretation. The relevant comment states that 'it is necessary to clarify that the standard in N.J.A.C. 6:28 has been the same as the Federal standard.' 21 N.J.R. 1385, 1391 (May 15, 1989)."

Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the current standard under the federal Act.

The meaning of "maximize the capabilities" is an issue of Tennessee state law, and if a state wishes to expand its standard governing special education, this should be left up to the state legislature or courts, not the federal judiciary.

CONCLUSION

For all the foregoing reasons the petition for a writ of certiorari filed by petitioners should be denied.

Respectfully submitted,

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